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No. (1) 07 1539

In The

Supreme Court of the United States

LESLIE D. MOWER,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ of Certiorari To The United States Court of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW:

- **Does the "One-Book" Rule as Applied in this case violate the *Ex Post Facto* Clause of the United States Constitution?**

- **Should the test for district courts to apply when admitting summary charts be clarified so as to achieve more uniform rulings?**

- **Is tax evasion a continuing offense for purposes of determining the application of the statutes of limitation?**

LIST OF ALL PARTIES

The parties to this matter include Leslie D. Mower and The United States of America.

CORPORATE DISCLOSURE STATEMENT

This appeal is not made by or in behalf of any corporation. Therefore, there is no parent or publicly held company owning 10% or more of the corporation's stock relevant to this matter.

UNITED STATES SUPREME COURT

Leslie D. Mower v. United States of America

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CASES

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OTHER CITATIONS

None.

CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THIS CASE

United States v. Thompson, 518 F.3d 832 (10th Cir. 2008).

United States v. Mower, 2006 U.S. Dist. LEXIS 87406 (D.Utah 10-30-2006).

United States v. Mower, No. 2:02CR787DAK (D.Utah 8-19-2005).

United States v. Mower, 351 F. Supp. 2d 1225; 2005 U.S. Dist. LEXIS 821; 95 A.F.T.R.2d (RIA) 1401 (D.Utah 1-10-2005).

United States v. Mower, 2004 WL 2348067 (D.Utah 10-15-2004).

United States v. Mower, 2004 WL 724371 (D.Utah 3-24-2004).

Leslie Mower, Appellant/Defendant ("Leslie") for her opening brief states:

STATEMENT OF JURISDICTION

(I) The date the judgment or order sought to be reviewed was entered.

The United States Court of Appeals for the Tenth Circuit issued a written decision on this matter on March 12, 2008, in this case, under the citation *United States v. Thompson*, 518 F.3d 832 (10th Cir. 2008).

(ii) Statutory provision allowing appeal.

28 U.S.C. § 1254(a) provides jurisdiction to appeal this matter to the United States Supreme Court.

APPLICABLE CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS

U.S. Constitution, Art. I, § 9, cl. 3.

> No bill of attainder or ex post facto law shall be past.

26 U.S.C. § 441(a)-(f) (2007).

Pertinent text of this statute contained in the Appendix to this Brief.

26 U.S.C. § 6531 (1954).

Pertinent text of this statute contained in the Appendix to this Brief.

26 U.S.C. § 7201 (1982).

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution.

26 U.S.C. § 7203 (1990).

Pertinent text of this statute contained in the Appendix to this Brief.

U. S. S. G. §1B1.1 (Nov. 2006).

Pertinent text of this regulation contained in the Appendix to this Brief.

U. S. S. G. §1B1.11 (Nov. 1993).

Pertinent text of this regulation contained in the Appendix to this Brief.

STATEMENT OF THE CASE

Thomas Mower ("Tom") and Leslie were married for approximately twenty years. They divorced approximately five years before the trial of this case in the United States District Court for the District of Utah.

During their marriage, Tom and Leslie began a multi-level marketing company, which became known as Neways, Inc. Although divorced, they continued as

50/50 owners of the Neways business.

James Thompson ("Thompson") was a corporate in-house attorney for Neways for a period of approximately one-and-a-half years (from the spring of 1996 to the summer of 1997).

Neways, Inc., a multi-level manufacturing and marketing company which sold personal care products, formed several subsidiary and associate entities to manage their domestic and foreign sales. Foreign entities in Australia and Malaysia are involved in the tax claims in this case. All the entities were either wholly owned by Neways, Inc., or were sister-entities and are referred to collectively in this Petition as "Neways." Their financial operations were complex and involved legal and accounting consultants who computed the taxes and prepared the tax returns.

The Government obtained indictments against

Tom, Thompson, and Leslie, charging them with tax evasion and conspiracy to evade taxes based upon claimed "personal" taxes arising out of Neways corporate transactions and personal tax returns. Tom's and Leslie's income tax evasion charges related to tax years 1992-1997. Thompson, corporate counsel for Neways, Inc., was charged with obstruction.

Though the Government alleged only a limited involvement by Leslie with what the claimed to be criminal conduct, she was nevertheless tried jointly with Tom and Thompson. The only evidence of a conspiracy involved a forged loan document prepared by Thompson, signed by Tom, but which did not involve Leslie, and tax returns which she did not sign. She did not learn of the forged document's existence until long after it had been provided by Thompson and Tom to the IRS investigator. At trial, the Government

prepared and used a tax summary chart showing over $3.2 million of income, which the jury then relied upon in their deliberations. (Gov't. Ex. 80-3). The jury returned a guilty verdict on all counts against all three Defendants on a general verdict form, without any determination of the tax liability.

The District Court determined the Government summary was incorrect, and found Leslie had unreported personal income of only $318,256 for the six years of 1992-1997. (Doc. 259 Amended Findings 4/07/06,16). The District Court found the total tax loss for the six year period was $89,112. *Id.* Using the 2005 Sentencing Guidelines, the District Court arrived at a base offense level of 16. *Id.* This was an average of just under $15,000 per year. The District Court also used the 2005 Sentencing Guidelines to impose a 2 point enhancement for sophisticated means, resulting

in a base offense level of 18, which the District Court used to justify imposing a 27 month sentence. (Doc. 279, Sentencing 9/13/06).

After sentencing, Leslie suffering a herniated disc and other serious medical complications. Relying on the recent Tenth Circuit opinion of *Wedelstedt*[1] Leslie petitioned the District Court to recommend placement in a community correction center. (Doc. 354, Motion to Consider Wedelstedt 2/26/07). The District Court found she was an appropriate candidate for community confinement but refused to recommend it. (Doc. 360, Order 2/28/07, p. 2). She was confined at FCI Dublin until April 28, 2008, and now is serving home detention in Utah.

Leslie timely filed an appeal of her conviction in the Tenth Circuit Court of Appeals on October 18,

---

[1] *Wedelstedt v. Wiley*, 477 F.3d 1160 (10th Cir. 2007).

2006. (Doc. 301, Notice of Appeal). The Tenth Circuit issued a written opinion, denying Leslie's appeal on March 9, 2008. See *United States v. Thompson*, 518 F.3d 832 (10th Cir. 2008). Leslie now petitions this Court to review the errors and inconsistencies in the application of the law relevant to that decision.

I. Facts.

Tom and Leslie began a multi-level marketing company, which became known as Neways. Several years after the company was begun, Tom and Leslie divorced. Tom had taken the lead with the financial issues in the business and required that he have the last say on all such matters. (Deposition of John Hunter (hereinafter "Hunter Dep."), pp. 42, 46, 56, 71, 77; see also Tr. 77). Leslie, was primarily a "cheerleader" for the company. (Hunter Dep., pp. 46, 50-51). After discovering Tom had not been candid

with her with regard to company finances, Leslie was made CFO at her request. (Tr. 365-367).

Leslie, with only a high school education, had no training in accounting, finance, or taxes. (Tr. 366). She tested at a fifth grade math ability while in custody at FCI Dublin. Leslie necessarily relied heavily upon the expertise of accountants, lawyers, and other Neways employees. (Tr. 366).

The Australian and Malaysian companies which generated the corporate income to the U.S. based corporations were set up by an accountant, John Hunter (hereinafter "Hunter"). (Hunter Dep., pp. 48-50). Leslie had no involvement in setting up the foreign financial structure, including what was named the "Neways, Inc. 1-7" flow of funds to Neways U.S. *Id.* She was neither a signatory on the foreign accounts nor gave financial input for those businesses. *Id.* The

evidence showed the money coming from Australia and Malaysia was income to Neways U.S. and not to Leslie. (Tr. 216-219; Hunter Dep. 18). The structure set up by Hunter was "an appropriate, proper and legal way" to distribute to Neways U.S. the corporate income which would otherwise have stayed in Australia. (Hunter Dep. 48-51). Hunter told Leslie that taxes on this corporate income to Neways were being paid in Australia. (Hunter Dep. at 50). Wade Winegar, former corporate attorney, testified the Neways 1-7 money was corporate income deposited to a corporate account. (Tr. 1045).

The Government charged both Tom and Leslie with failing to report $3,209,815 of foreign and domestic income. (Gov't Ex. 80-3). The Government claimed the money was deposited into two corporate accounts known as the Rezults account and Mower

Properties, Inc. account, and was used to purchase real property referred to as Hobblecreek. (Doc. 16, Indictment).

The Government alleged $458,550 of foreign and domestic commission income deposited into the Rezults account was really personal income to Tom and Leslie. (Doc. 259 Amended Findings, 10). The Rezults account was controlled by Tom, and used to pay corporate expenses. (Tr. 285; 311-312). Though this money was placed into a corporate account, the District Court determined $120,340 of it was personal income to Tom and Leslie, including a judicially imposed arbitrary figure of $50,000 of foreign income. (*Id.* at 10-16).

The District Court found there was insufficient evidence Leslie had knowledge or involvement with the Hobblecreek property to include the $450,694 in her tax loss calculation. (Doc. 259 Amended Findings, 14).

She did not sign any of the purchase documents for Hobblecreek, or have any discussions with the real estate agent. (Tr. 505-34). In March 1997, when questions arose concerning the alleged loan evidenced by the forged loan document, she was not involved in any of the discussions regarding that matter while Tom, corporate counsel, the accountants, Neways Australia's area manager Michael Cunningham, and others were. (Tr. 578, 590, 652). When Leslie was informed of the problem by corporate counsel and the accounting staff, she was told the matter was being resolved. (Tr. 653). Leslie had nothing to do with the amended returns prepared by outside, independent certified public accountants, and all taxes were paid. (Tr. 598; Exs. 10-5; 10-8).

Some of the Neways Australia and Neways Malaysia money was deposited or wired to the Mower

Properties, Inc. account. This account was used to build a corporate warehouse and pay corporate expenses. (Tr. 599). Karin Lane, a Neways in-house accountant, explained the funds were corporate income to Neways U.S., which, in turn, loaned money to Mower Properties, Inc. (Tr. 435).

All the taxable income deposited into the Mower Properties, Inc. and Rezults accounts was reported and taxes paid on the Neways U.S. returns for the fiscal years ending August 31, 1994, and August 31, 1995, and the first amended return for the fiscal year ending August 31, 1996. (Tr. 599-602, 1110-1111; Exs. 10-6; 10-9; 10-11). These returns were also prepared by independent certified public accountants.

ARGUMENT

I. Does the "One-Book" Rule as Applied in this case violate the *Ex Post Facto* Clause of the United States Constitution?

The Tenth Circuit adopted the "One-Book" rule in *United States v. Nelson*, 36 F.3d 1001, 1004 (10th Cir. 1994), which directs the District Court to only look to one version of the Sentencing Guidelines when sentencing a defendant. In the present case, the Tenth Circuit Court of Appeals affirmed the District Court's use of different versions of the Sentencing Guidelines, thereby contradicting the One-Book rule, violating the *Ex Post Facto* Clause, and causing an even greater split between the Circuit Courts with respect to the holding in *United States v. Booker*, 543 U.S. 220 (2005). This Court should clarify the use of the Sentencing Guidelines because the law is unclear and the circuit court decisions are irreconcilable, depriving

United States citizens of due process of law.

"The Sentencing Commission intended the Guidelines to be applied as a 'cohesive and integrated whole.'" *United States v. Kikumura*, 918 F.2d 1084, 1109 (3d Cir. 1990); *see* United States Sentencing Commission, *Guidelines Manual* §1B1.1 (Nov. 1987)("Guidelines Manual"); *see also United States v. Lawrence*, 916 F.2d 553, 555 (9th Cir. 1990) ("By allowing the guidelines to take effect, Congress has sanctioned the approach of the Commission, which, as expressed by the Commission's 'Application Instructions' of §1B1.1, requires that the guidelines be read as a whole."). "Applying various provisions taken from different versions of the Guidelines would upset the coherency and balance the Commission achieved in promulgating the Guidelines. Such an application would also contravene the express legislative objective

of seeking uniformity in sentencing." *United States v. Stephenson*, 921 F.2d 438 (2nd Cir. 1990).

In applying the Sentencing Guidelines, the District Court must also ensure there is no violation of the *Ex Post Facto* Clause. The *Ex Post Facto* Clause of the U. S. Constitution states that "[n]o bill of attainder or ex post facto law shall be passed." U.S. Const., Art. 1, § 9, cl. 3. "The *Ex Post Facto* Clause is violated if the court applies a guideline to an event occurring before its enactment, and the application of that guideline disadvantages the defendant 'by altering the definition of criminal conduct or increasing the punishment for the crime.'" *United States v. Svacina*, 137 F.3d 1179, 1186 (10th Cir. 1998) (quoting *Lynce v. Mathis*, 519 U.S. 433, 441 (1997)).

"[T]he central concern of the *Ex Post Facto* Clause is fair notice to the defendant that the

punishment for a crime has been increased from what it was when the crime was committed." *United States v. Sullivan*, 255 F.3d 1256, 1262 (10th Cir. 2001); *see also United States v. Lacefield*, 146 Fed. Appx. 15, 22 (6th Cir. 2005).

Section 1B1.11(b)(3) of the Sentencing Guidelines states:

> If the defendant is convicted of two offenses, the first committed before, and the second after, a revised edition of the Guidelines Manual became effective, the revised edition of the Guidelines Manual is to be applied to both offenses.

U.S.S.G. § 1B1.11(b)(3). The directive of Section 1B1.11(b)(3) to use the later edition of the Guidelines whenever a defendant has been convicted of offenses occurring both before and after a revision that increased the offense level after the earlier offense conduct occurs is "in seeming contradiction with its guidance on the *Ex Post Facto* Clause," (see *Lacefield*,

146 Fed. Appx. at 21), and with the clause itself. Also, it is "settled that the commentary to the guidelines is binding on federal courts as controlling law unless it either (1) violates the Constitution or a federal statute or (2) 'is plainly erroneous or inconsistent with the [guidelines].'" *United States v. Bertoli*, 40 F.3d 1384, 1405 (3d Cir. 1994) (*citing Stinson v. United States*, 508 U.S. 36, 45, 113 S.Ct. 1913, 1919, 123 L. Ed.2d 598 (1993)).

Circuit Courts are severely divided on the question of whether sentences consistent with Section 1B1.11(b)(3) and the One-Book rule violate the *Ex Post Facto* Clause. Both the Ninth Circuit and the Third Circuit remain of the view that it does. In the Third Circuit's decision in *Bertoli*, the circuit court reiterated its holding that the One-Book rule does not override *Ex Post Facto* concerns, stating "[t]he so-called rule is

inconsistent...and other cases in this Court...have prohibited the application of more stringent penalties than were authorized at the time of the offense." *See Bertoli*, 40 F.3d at 1403-04.

In *Bertoli*, the District Court grouped conduct charged in separate counts of obstruction of justice and conspiracy-to-obstruct justice and treated them as one course of conduct, though the events relating to the conspiracy to obstruct justice charge occurred in 1990 and the other crimes occurred in 1992. *Id.* Defendant Bertoli argued the district court should have used the 1989 Guidelines Manual to calculate the base offense level because a substantive change resulted in more severe penalties which took effect after the Count six crime was completed. *Id.* The Third Circuit agreed with Bertoli and expressly "disapproved the practice of combining different counts of the indictment when

determining which Guidelines Manual applies." *Id.* at 1403 (*citing United States v. Seligsohn,* 981 F.2d 1418, 1424 (3d Cir. 1992)). The *Bertoli* Court continued that the One-Book rule does not override *Ex Post Facto* concerns and the district court erred by failing to independently analyze which Guidelines Manual should have applied to the conduct charged in each count. *Id.* at 1404.

The Ninth Circuit's holding is consistent with the Third Circuit. In *United States v. Ortland,* 109 F.3d 539 (9th Cir. 1997), defendant Ortland argued the district court sentenced him under Sentencing Guidelines which were not in effect at the time of four of his five charged crimes. *Ortland,* 109 F.3d at 545-46. The Ninth Circuit agreed with Ortland, specifically stating that "[e]ven if the later offense is sentenced at a higher level, that does not undercut the fact that the

earlier offenses cannot be." *Id.* at 546. The *Ortland* court further provided that the district court implicitly followed the Sentencing Guidelines policy statement under U.S.S.G. § 1B1.11(b)(3), but that the policy statement § 1B1.11(b)(3) violated the *Ex Post Facto* Clause of the constitution. *Id.*

Contrarily, the Eleventh Circuit determined the application of § 1B1.11(b)(3) did not violate the *Ex Post Facto* Clause even though it resulted in a harsher sentence for an offense committed prior to enactment of the Sentencing Guidelines in effect at the time of the sentencing in *United States v. Bailey*, 123 F.3d 1381 (11th Cir. 1997). Defendant Bailey's mail fraud and various firearm convictions occurred on separate occasions, and he was sentenced pursuant to Guidelines in effect during his earlier crimes. *Id.* The Eleventh Circuit reversed the district court because "a

defendant knows, when he continues to commit related crimes, that he risks sentencing for all of his offenses under the latest, amended Sentencing Guidelines Manual," and instructed the district court to use the revised Sentencing Guidelines for sentencing. *United States v. Bailey*, 123 F.3d at 1403-07; *see also United States v. Cooper*, 35 F.3d 1248, 1250-53 (8th Cir. 1994) (where defendant committed three separate firearm offenses, two committed prior to the effective date of an updated version of the Sentencing Guidelines, and the court affirmed application of the revised Sentencing Guidelines even though it resulted in an increased penalty).

In the present case, the Tenth Circuit Court of Appeals affirmed the District Court's approach of combining separate tax evasion offenses and sentencing Leslie, the petitioner in this case, pursuant

to revised Guidelines in effect on the date of the last alleged offense. *See United States v. Thompson*, 518 F.3d 832 (10th Cir. 2008). Leslie was convicted of conspiracy and tax evasion for years 1992-1997. *Id.* There were three different versions of the Sentencing Guidelines available for the District Court to use: Years 1993, 2001, and 2005. The District Court computed the tax loss using the 2005 Sentencing Guidelines and determined her sentence using the 2001 Sentencing Guidelines. *Id.*, see also Doc. 259). The District Court applied policy statement § 1B1.11(b)(3) in a mandatory fashion, using the revised guidelines and violating the *Ex Post Facto* Clause. Such action is inconsistent and unfair to Leslie.

The Circuit decisions regarding this issue are irreconcilable. Both the Third and Ninth Circuits have held that separate offenses, whether or not the same

crime, should be analyzed and the defendant sentenced under the corresponding Guidelines in effect when each separate offense occurred. See *Bertoli*, 40 F.3d at 1405); see also *Ortland*, 109 F.3d 539. These Circuits found that applying the policy of § 1B1.11(b)(3) violated the *Ex Post Facto* Clause of the Constitution. *Id.* However, the Eighth, Tenth, and Eleventh Circuits have held that separate offenses should be sentenced under the version of the Guidelines in effect at the time of the last act. See *Bailey*, 123 F.3d at 1403-07; *Cooper*, 35 F.3d at 1250-53; *Thompson*, 518 F.3d at 869-70. Alternatively, these Circuits found no violation of the *Ex Post Facto* Clause because the Guidelines' policy statement § 1B1.11(b)(3) states that no such violation occurs.

The law is unclear on this issue; however, courts have interpreted the *Ex Post Facto* Clause in such a

way that it is "violated if the court applies a guideline to an event occurring before its enactment, and the application of that guideline disadvantages the defendant 'by altering the definition of criminal conduct or increasing the punishment for the crime.'" *United States v. Svacina*, 137 F.3d 1179, 1186 (10th Cir. 1998) (quoting *Lynce v. Mathis*, 519 U.S. at 441). "[T]he central concern of the *Ex Post Facto* Clause is fair notice to the defendant that the punishment for a crime has been increased from what it was when the crime was committed." *United States v. Sullivan*, 255 F.3d 1256, 1262 (10th Cir. 2001); see also *United States v. Lacefield*, 146 Fed. Appx. at 22. The approach taken by the Eighth, Tenth, and Eleventh Circuits violates the plain language of the *Ex Post Facto* Clause. It deprives U.S. citizens of due process of law by failing to provide notice of more severe

penalties after the Sentencing Guidelines are revised. Further, citizens are denied consistent treatment of sentencing dependent upon which Circuit Court reviews their case. In the Ninth Circuit, a defendant will receive fair sentencing under the Sentencing Guidelines in effect when his crime was committed, whereas a defendant in the Tenth Circuit will receive harsher sentencing under the Sentencing Guidelines in effect on the date he committed his last crime. This is prejudicial, unfair, and violates equal protection standards of the Constitution.

Therefore, this Court must clarify the appropriate test for the application and use of the Sentencing Guidelines in order to ensure equal treatment among citizens in each Circuit, while also protecting constitutional freedoms.

II. Should the test for district courts to apply when admitting summary charts be clarified so as to achieve more uniform rulings?

The decision whether to allow the use of summary charts lies within the district court's discretion. *See United States v. Diez*, 515 F.2d 892, 906 (5th Cir. 1975). However, courts recognize the danger of using summary charts because the jury may use the charts exclusively in arriving at a verdict, rather than examining the primary evidence the charts purport to summarize. *Holland v. United States*, 348 U.S. 121, 127-8 (1954), *reh. denied*, 348 U.S. 932 (1955). Summary charts should not be admitted unless a proper foundation is established connecting the numbers on the charts with the underlying evidence. *United States v. Citron*, 783 F.2d 307, 316 (2nd Cir. 1986). There is danger of substantial prejudice because figures on charts give an aura of authenticity

to the government's allegations: "bare figures have a way of acquiring an existence of their own, independent of the evidence which gave rise to them." *Id.* at 128.

Rule 1006 of the Federal Rules of Evidence requires that "a summary document 'must be accurate and nonprejudicial.'" *United States v. Bray*, 139 F.3d 1104, 1110 (6th Cir. 1998) (citing *Gomez v. Great Lakes Steel Div., Nat'l Steel Corp.*, 803 F.2d 250, 257 (6th Cir. 1986)).

> This means first that the information on the document summarizes the information contained in the underlying documents accurately, correctly, and in a non-misleading manner. Nothing should be lost in translation. It also means, with respect to summaries admitted in lieu of the underlying documents, that the information on the summary is not embellished by or annotated with conclusions of or inferences drawn by the proponent. (Emphasis added.)

United States v. Bray, 139 F.3d at1110 (emphasis

added). Because of this danger, summary charts are to be used with caution, due to potential abuse. *United States v. Richardson*, 233 F.3d 1285 (11th Cir. 2000). Indeed, "a trial court is charged with grave responsibilities to make certain an accused is not unjustly convicted in a 'trial by charts.'" *Gordon v. United States*, 438 F.2d 858, 876 (5th Cir. 1971). "[T]he essential requirement is not that the charts be free from reliance on any assumptions, but rather that these assumptions be supported by evidence in the record." *Diez,* 515 F.2d at 905. It is critical for a summary chart to accurately represent the evidence and avoid unsupported, argumentative or prejudicial statements of opinion.

> The use of this type of evidence, however, has inherent dangers to an accused, for a jury is often unfairly and unduly impressed by the apparent authenticity of a government witness' chart computations, as such, rather than by the

> truth and accuracy of the underlying facts and figures supporting them.

Lloyd, 226 F.2d at 17; *see also United States v. O'Connor*, 237 F.2d 466, 275 (2nd Cir. 1956)(stating district courts are required to ascertain that summary charts fairly represent and summarize the evidence upon which they are based); *United States v. Taylor*, 210 F.3d 311, 315 (5th Cir. 2000); *United States v. Keltner*, 675 F.2d 602, 606 (4th Cir. 1982).

Because of the great potential for abuse and prejudice, this Court needs to clarify the district court's discretion with respect to the use of summary charts. In this case, the jury relied upon over-exaggerated charts to convict Leslie. The District Court later found the charts the jury relied upon to be erroneous. The Government's exhibits attributed personal income to Leslie of $3,775,764 and unreported income of $3,209,815. (Ex. 80-3). Considering the evidence in

favor of the Government, the District Court found Leslie had unreported income of less than 10% of that amount, $318,256. (Doc. 59, ¶ 16). The Government's "Summary" Charts artificially included millions of dollars of corporate income that never should have been attributed to Leslie. *Id.* Yet, the District Court allowed the summary charts to remain before the jury and allowed the jury to rely upon the charts throughout the two week trial. The District Court further allowed the summary charts to be brought into the jury room during their deliberations. This is just the sort of prejudicial information that prior courts have warned should not be admitted. See *United States v. Means*, 695 F.2d 811, 817 (5th Cir. 1983) (citing *Steele v. United States*, 222 F.2d 628, 630 (5th Cir. 1955)). It was admitted because of an abuse of discretion allowed by an uncertain rule.

The First Circuit noted "[i]t is hard to imagine an issue on which a trial judge enjoys more discretion than as to whether summary exhibits will be helpful." *United States v. Milkiewicz*, 470 F.3d 390, 398 (1st Cir. 2006)(*quoting Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47, 67 (1st Cir. 2002). In *Milkiewicz*, the First Circuit upheld the district court's use of summary chart exhibits because "the district court exercised ...discretion...with meticulous care," including requiring the government to modify the summaries to eliminate unnecessary and potentially prejudicial information and labels, and explicitly considering "the usefulness versus the potential misuse of summaries of this nature." *Milkiewicz*, 470 F.3d at 398. While that should have happened in this case, it did not. The rule does not require it.

In other Circuits, the district court's discretion

of allowing the use of summary charts has been upheld merely because of a limiting instruction given to the jury. *See United States v. Harms,* 442 F.3d 367, 376 (5th Cir. 2006); *United States v. Daniels*, 986 F.2d 451, 456 (11th Cir. 1993); *United States v. Casamento*, 887 F.2d 1141, 1151 (2nd Cir. 1989); *United States v. Mann*, 884 F.2d 532, 539 (10th Cir. 1989).

The Fourth Circuit has noted that there is a lack of cohesion among federal courts as to the guiding principles in admitting summary charts. *United States v. Johnson*, 54 F.3d 1150, 1158 (4th Cir. 1995). The First Circuit has similarly lamented that the precedent with regard to the use of summary charts in that circuit is somewhat "opaque." *See Milkiewicz*, 470 F.3d at 395.

In *United States v. Citron*, a tax evasion case, the Government introduced a summary chart not tied

to the evidence. *Citron*, 783 F.2d 307. The trial judge admitted the chart on the theory that "cross examination will destroy it totally." *Id.* The Second Circuit held the chart's admission was reversible error:

> Although reliance on cross-examination may be appropriate in other contexts, the defendant here was entitled to greater protection. Summary charts should not be admitted unless a proper foundation is established connecting the numbers on the chart with the underlying evidence. Courts have long required that district courts ascertain that summary charts "fairly represent and summarize the evidence upon which they are based." (Citations omitted.) Unless this requirement is met, the chart is more likely to confuse or mislead the jury than it is to assist it. *See Fed.R.Evid.* Rule 403."

Id. at 316.

The Fifth Circuit similarly reversed a conviction where the jury was permitted to take the Government expert's summaries purporting to be computations of income into the jury room over the objection of defense

counsel, who pointed out the summaries contained omissions, interpretations, and discrepancies between the record and the exhibits, and the exhibits merely represented the argument of the Government's expert. *Steele v. United States*, 222 F. 2d at 629-631. The defense contended in the *Steele* case the exhibits did not just summarize the evidence, but evaluated the evidence by assigning credibility and weight to witness testimony, thus invading the province of the jury. *Id.* The Fifth Circuit agreed and reversed the conviction, observing the instruction to the jury that the charts were not original evidence and were not binding on the jury was not sufficient to counter the prejudicial effect. *Id.* at 630.

In the case at hand, the Government prepared and presented summary charts that grossly distorted the evidence and the District Court failed to provide

adequate safeguards to prevent prejudice by those charts.

First, the charts specifically stated that foreign corporate commission was personal income to Leslie instead of properly categorizing it as corporate income. The chart summary listed total unreported income of $3,209,815, but does not explain that $2,709,403, or 84%, was foreign commission income to the corporation. (Gov't Ex. 80-3).

Second, the District Court allowed the inaccurate summary charts to remain visible to the jury during the entire two-week trial and were never removed from the jury's view. Further, they were allowed to be brought into the jury room during deliberation. Although the District Court found that the $2,709,403 in foreign commission was not personal income to Leslie, it failed to reduce or eliminate the

prejudice of these overwhelmingly false figures on the summary charts in one limiting instruction. (Doc. 259, ¶¶ 15-16). Thus, the District Court did not provide adequate safeguards to prevent prejudice to Leslie.

This evidence was presented to the Tenth Circuit on appeal. See *Thompson*, 518 F.3d at 858. Though the facts are nearly the same as those in *Steele*, the Tenth Circuit found that there was no abuse of discretion and that the limiting instruction provided was sufficient to counterbalance the prejudicial effect of the erroneous charts. *Id.* at 859. The District Court in this case did not require any modification of the charts, nor did it make any apparent attempt to weigh it's usefulness. Such was the cause of error. The District Court simply left the erroneous chart to cross-examination and a limiting jury instruction. This, however does not remove the

"air of credibility" built into a chart that was referred to many, many times over the course of a two-week trial. Nor does it remove the effect the exaggerated printed numbers would have upon a common jury. Certainly this Court will recognize that the perception guilt is associated with high numbers in a tax evasion case. The higher the number, the more guilty the defendant is perceived to be. And obviously, the higher the number, the greater the penalty associated with it. Furthermore, the Tenth Circuit's approval of this relaxed and reactive treatment of the summary charts flies directly in the face of the established precedence in *Steele*.

The First Circuit in *Milkiewicz* adopted a standard, that if would have been applied in this case, likely would have resulted in a different finding. See *Milkiewicz*, 470 F.3d at 398. The First Circuit

approved of certain steps that were taken by the trial court in that case for the admission of summary charts under Federal Rule of Evidence 1006. *Id.* Under this standard, the district courts would be required to (1) modify the chart summaries to eliminate unnecessary and potentially prejudicial information and labels, (2) weigh the usefulness of the chart with the potential misuse of the summaries, and (3) provide a limiting instruction to the jury regarding the use of summary charts. *Id.* In this case, the District Court did not modify the chart summaries. It did not amend the grossly distorted numbers, notwithstanding the Court's own findings that they were wrong. Rather, the District Court left the summary charts unaltered. Adoption of a uniform rule, as was applied by the First Circuit, would provide uniformity and direction to the district courts in admitting summary charts, while also

guarding against inconsistent and prejudicial results to the parties.

III. Is tax evasion a continuing offense for purposes of determining the application of the statutes of limitation?

The Tenth Circuit adopted the rule "that when a defendant commits a series of evasive acts over several years after incurring a tax liability, the statute of limitations begins to run on the date of the last evasive act." *United States v. Anderson*, 319 F.3d 1218, 1219 (10th Cir. 2003). In the present case, the Tenth Circuit affirmed Leslie's conviction, which combined separate tax offenses into one continuing offense in order to bring the indictments within the statute of limitations. See *Thompson*, 518 F.3d at 856-58. Because the Circuit Courts are divided on when the statute of limitations apply, this Court must clarify whether tax evasion is a continuing offense. The law

is unclear, irreconcilable, and inconsistent in its application.

The essential elements of a § 7201 violation for tax evasion are (1) the existence of a substantial tax deficiency, (2) an affirmative act[2] constituting an evasion or attempted evasion of the tax, and (3) willfulness. See 26 U.S.C. § 7201; see also *Spies v. United States,* 317 U.S. 492 (1943); *United States v. Mounkes*, 204 F.3d 1024, 1028 (10th Cir. 2000). Most importantly, the crime of tax evasion is complete as soon as every element of the crime occurs, or when the taxpayer files a false return. *See United States v. Habig*, 390 U.S. 222, 223 (1968)(offense "committed at time the return is filed"); *Sansone v. United States*, 380 U.S. 343, 354 (1968) (offense complete "as soon as the

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[2]The "affirmative act" requirement distinguishes the felony of attempted tax evasion from the misdemeanor of failure to file. *Compare* 26 U.S.C. § 7201 with 26 U.S.C. § 7203; see *Spies*, 317 U.S. at 498-99.

false and fraudulent understatement of taxes ... was filed"); *United States v. Payne*, 978 F.2d 1177, 1179 (10th Cir. 1992), *cert. denied*, 508 U.S. 950 (1993) (citations omitted) (offense complete when defendant files false and fraudulent return on or after due date); *Swallow v. United States*, 307 F.2d 81, 83 (10th Cir. 1962) (offense "complete when the taxpayer files a false and fraudulent return with intent to evade ... tax due").

In typical tax evasion cases, the alleged offense is complete and the six year statute of limitations begins to run when a defendant willfully files a false return on the filing date. When doubt exists about the statute of limitations in a criminal case, the limitations period should be construed in favor of the defendant. *See Habig*, 390 U.S. at 226-27. The statute of limitations is six (6) years for the offense of willfully

attempting to evade or defeat any tax. 26 U.S.C. § 6531. The statute of limitations is triggered on the date of the last affirmative act constituting evasion or attempted evasion. *United States v. Winfield,* 960 F.2d 970 (11th Cir. 1992); see also *United States v. Ferris,* 807 F.2d 269 (1st Cir. 1986); *United States v. Dandy,* 998 F.2d 1344 (6th Cir. 1993); *United States v. DeTar,* 832 F.2d 1110 (9th Cir. 1987). Anytime an indictment alleges a fraudulent return was filed on the return due date, that filing constitutes an affirmative act of evasion on the filing date and the offense is then complete. *See e.g., Habig,* 390 U.S. at 223; *Sansone,* 380 U.S. at 354; *Payne,* 978 F.2d at 1179; *Swallow,* 307 F.2d at 83. As such, tax evasion is a single crime. Each tax year stands alone; therefore, the failure to pay taxes in each tax year is a separate offense. See e.g., *United States v. Smith,* 335 F.2d 898, 900-01 (7th

Cir. 1964).

The Tenth Circuit has narrowly construed the "continuing offense" doctrine as applied to the statute of limitations. In the recent case of *United States v. Dunne*, 324 F.3d 1158 (10th Cir. 2003), the Court held making a false statement under 18 U.S.C. §1001 is not a continuing offense. *Dunne*, 324 F.3d at 1164. The *Dunne* Court observed in determining whether there is a continuing offense, that the focus should be on the nature of the offense, not the specific characteristics of the conduct in the case. *Id.* at 1164. Likewise, in *United States v. Sullivan*, 242 F.3d 1248, 1254 (10th Cir. 2001), the Tenth Circuit found three counts of willful failure to file a return under 26 U.S.C. § 7203 were three separate offenses. "Although the three offenses were indisputably related, they nonetheless did not constitute a continuing offense." *Id.* Nothing

in the language of 26 U.S.C. § 7201 "compels" the conclusion the offense is continuing. Certainly, "if Congress intended that to be the case, it could have clearly stated so." *Dunne*, 324 F.3d at 1164. Nor does the nature of the crime indicate "Congress must have assuredly intended it be treated as a continuing one." *Id.* The fact the offense is complete when a false and fraudulent return is filed on the due date (or, later, if extended) compels the conclusion the offense of attempted tax evasion is not a "continuing offense."

Courts considering Congress' intent have found attempted tax evasion not to be a continuing offense. See eg., *United States v. McGill*, 964 F.2d 222, 230 (3rd Cir. 1992); *Norwitt v. United States*, 195 F.2d 127, 133 (9th Cir. 1952) ("An attempt to evade a tax and payment thereof is not a continuing offense"); *United States v. Sullivan*, 98 F.2d 79, 80 (2nd Cir.

1938)(holding an attempt to evade income tax is a separate offense for each year); *United States v. Kirkman*, 755 F. Supp. 304, 306-08 (D. Idaho, 1991) (concluding tax evasion is not a continuing offense); *see also United States v. Johnson*, 123 F.2d 111, 119 (7th Cir. 1941), reversed on other grounds in *United States v. Johnson*, 319 U.S. 503, 63 S.Ct. 1233, 87 L.Ed. 1546. The Ninth Circuit discussed the law applicable to continuing offenses, stating:

> The doctrine of continuing offenses essentially extends the statute of limitations beyond its stated term. Because of this tension, the Supreme Court has established "that the doctrine of continuing offenses should be applied only in limited circumstances." *Toussie v. United States*, 397 U.S. 112, 115, 90 S.Ct. 858, 860, 25 L.Ed.2d 156 (1970) ... [These considerations] require that such a result should not be reached unless the explicit language of the substantive criminal statue compels such conclusions, or the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one.

United States v. Gray, 876 F.2d 1411, 1418 (9th Cir. 1989). Further, the Third Circuit found the plain language of Section 7201 "evidences the congressional intent to allow distinct, significant, affirmative acts of tax evasion to constitute separate section 7201 offenses." *United States v. Pollen*, 978 F.2d 78, 86 (3rd Cir. 1992). In fact, the Idaho District Court concluded there is no authority which suggests that tax evasion under Section 7201 is akin to the continuing offense of conspiracy. *Kirkman*, 755 F. Supp. at 306.

In this case, the District Court concluded the statute of limitations began to run on Counts Two through Five, which relate to the tax years 1992 through 1995, upon the filing of amended corporate tax returns for Neways, Inc. filed in September and October 1998. (Doc. 221 Memorandum Decision 8/19/05, 7). Relying upon the amended corporate

returns was an error. As discussed above, an attempt to evade income tax is a separate offense for each year. *Sullivan*, 98 F.2d at 80; *Kirkman*, 755 F. Supp. at 306-08; *Pollen*, 978 F.2d at 86. The District Court lumped the tax years together, in clear violation of *Sullivan*, 242 F.3d at 1254 and other case law. This Court must clarify these inconsistencies. Further, the Government acknowledged the inconsistency of the District Court's finding the amended returns were not acts in furtherance of the conspiracy, but were the basis in pretrial and trial ruling to extend the statute of limitations for purposes of Counts 2 through 5. (*Id.* at 10 lines 18-25).

These circuit court decisions are irreconcilable. The Second, Third, and Ninth Circuits have held that convictions for tax evasion are separate offenses and the statute of limitations will begin at the last

affirmative act of evasion for each offense. However, the Fourth, Sixth, Tenth, and Eleventh Circuits have held that tax evasion is a continuing offense, akin to conspiracy, and the statute of limitations will commence at the last affirmative act of evasion for all combined offenses.

The law is unclear on this issue. To discern Congress' intent, the court must look first to the plain language of the statute, then to the legislative history and the overall statutory scheme of which it is part. *United States v. Cooper*, 966 F.2d 936, 942 (5th Cir. 1992). However, if the legislative history of the section contains nothing helpful on the question, the Court must find the answer from the section itself and its context in the revenue laws. See *Spies*, 317 U.S. at 495.

In this case, there is nothing in the substantive law interpreting 26 U.S.C. § 7201 indicating whether

Congress intended to classify tax evasion as a continuing offense. *Kirkman*, 755 F. Supp. at 306. Therefore, looking to the treatment of income tax under the Internal Revenue Code, both personal and corporate tax returns are filed yearly with the IRS. *See* 26 U.S.C. § 441(a)-(b). The IRS does not wait to determine a deficiency in taxes until after the taxpayer begins filing again. The IRS determines a deficiency for *each year*, with interest and penalties being determined for that specific year. *See* 26 U.S.C. § 441(a)-(f). Each deficiency is taken by year, not lumped together to determine a deficiency. *Id.* Evading taxes or having a tax deficiency is complete in the year the taxes are required. For example, if a taxpayer evades taxes for the year of 2006, then the offense would be complete in April 2007, unless the taxpayer continues to evade that same year's tax by

taking some affirmative act in the future. Thus, it seems inherent tax evasion is not a continuing offense because taxes are collected yearly.

The approach taken by the Fourth, Sixth, Tenth, and Eleventh Circuits is incorrect and violates the historical treatment of tax offenses. Further, citizens are denied consistent treatment of sentencing dependent upon which Circuit Court reviews their case. In the Third Circuit, the statute of limitations will commence once the tax year is over, whereas a defendant in the Tenth Circuit will receive harsher result because the statute of limitations will not commence until the end of all years of evading taxes. This is prejudicial, inconsistent, and unfair.

Therefore, this Court must clarify whether tax evasion is a continuing offense to ensure equal treatment among citizens in each Circuit, while also

protecting constitutional freedoms inherent in United States citizenship.

The District Court's decision was erroneous and should be overturned. Further, the Tenth Circuit ignored its own precedent, by upholding Leslie's conviction using an incorrect standard of the statute of limitations in tax evasion cases. Under *United States v. Anderson*, 319 F.3d 1218 (10th Cir. 2003), the statute of limitations begins to run on the date of the last affirmative act of evasion *for each count*, not the last count alleged in the indictment. In a criminal tax evasion case, each year stands alone and the failure to pay taxes in each one of the years constitutes a separate offense. See *Smith*, 335 F.2d at 900-01. The District Court erroneously lumped the tax years into one continuous period and identified the unreported income and corresponding tax loss according to source

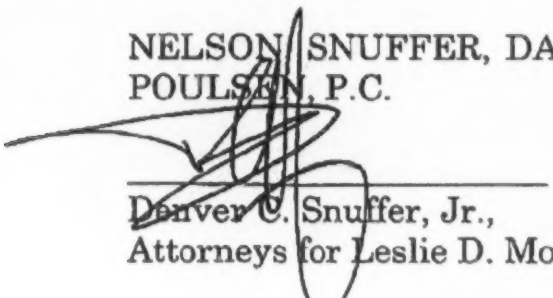
categories (savings accounts, corporate accounts, miscellaneous, etc.) instead of tax years. (Doc. 259).

CONCLUSION

Based on the foregoing, Petitioner, Leslie D. Mower, respectfully requests this Court accept her Petition and grant Certiorari to review the issues affecting her.

Dated this 5 day of June, 2008.

NELSON, SNUFFER, DAHLE & POULSEN, P.C.



Denver C. Snuffer, Jr.,
Attorneys for Leslie D. Mower

No. _____

In The

Supreme Court of the United States

LESLIE D. MOWER,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ of Certiorari To The United States Court of Appeals For The Tenth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX 1:

U.S. v. THOMPSON, 518 F.3d 832 (10th Cir. 2008).

UNITED STATES of America, Plaintiff-Appellee, v. James THOMPSON, Defendant-Appellant.

United States of America, Plaintiff-Appellee, v. Thomas E. Mower, Defendant-Appellant.

United States of America, Plaintiff-Appellee, v. Leslie D. Mower, Defendant-Appellant.

Nos. 06-4232, 06-4256, 06-4258.

United States Court of Appeals, Tenth Circuit.
March 12, 2008.

Appeal from the United States District Court for the District of Utah, Paul Cassell, J.

Scott C. Williams, Salt Lake City, UT, for Defendant-Appellant, James Thompson.

Max D. Wheeler (Rodney R. Parker and Sam Harkness with him on the briefs), of Snow, Christensen & Martineau, Salt Lake City, UT, for Defendant-Appellant, Thomas E. Mower.

Denver C. Snuffer, Jr. of Nelson, Snuffer, Dahle & Poulsen, P.C., Sandy, UT, for Defendant-Appellant, Leslie D. Mower.

Gregory Victor Davis, Attorney, Tax Division,

United States Department of Justice, Washington, D.C., (Richard T. Morrison, Acting Assistant Attorney General; Alan Hechtkopf, Attorney, Tax Division, United States Department of Justice, Washington, D.C.; and Troy A. Eid, United States Attorney, District of Colorado, Denver, CO, of Counsel, with him on the briefs), for Plaintiff-Appellee.

Before KELLY, McWILLIAMS, and BRISCOE, Circuit Judges. BRISCOE, Circuit Judge.

Defendants Thomas Mower and Leslie Mower appeal their convictions of one count of conspiracy to defraud the United States, in violation of 18 U.S.C. § 371, and six counts of tax evasion, in violation of 26 U.S.C. § 7201, for the years 1992 through 1997. Defendant James Thompson appeals his conviction of one count of conspiracy to defraud the United States, in violation of 18 U.S.C. § 371, and one count of corruptly endeavoring to interfere with the administration of internal revenue laws, in violation of 26 U.S.C. § 7212(a). Thomas Mower argues that (1) the evidence was insufficient to convict him of tax evasion for the years 1992, 1993, and 1997; (2) the district court erred in admitting the government's summary charts; and (3) the district court erred in compelling Thomas Mower's attorney, Allen Davis, to testify before the grand jury. Leslie Mower contends that (1) the evidence was insufficient to convict her of all counts; (2) the district court erred in admitting the government's summary charts; (3) her sentence was procedurally and substantively unreasonable; (4) the district court erred in not giving certain jury instructions; (5) the statute of limitations barred four

of the counts of tax evasion, for the years 1992 through 1995; (6) her sentence violated the *ex post facto* clause; and (7) the district court erred in denying her motion for severance. James Thompson argues that (1) the evidence was insufficient to convict him of either count; (2) the statute of limitations barred both counts; and (3) the district court erred in denying his motion for severance. We exercise jurisdiction under 28 U.S.C. § 1291 and affirm.

I.

On December 19, 2002, Thomas Mower and his wife, Leslie Mower, were indicted on one count of conspiracy to defraud the United States, in violation of 18 U.S.C. § 371, and six counts of tax evasion, in violation of 26 U.S.C. § 7201, for the tax years 1992 through 1997. On April 8, 2003, the grand jury returned a Supersede ing Indictment, adding charges against James Thompson for one count of conspiracy to defraud the United States, in violation of 18 U.S.C. § 371, and one count of corruptly endeavoring to interfere with the administration of internal revenue laws, in violation of 26 U.S.C. § 7212(a).

Defendants Thomas and Leslie Mower owned three corporations — Neways US, Neways Australia, and Neways Malaysia[fn1] — each of which utilized a multilevel marketing system to sell a variety of personal care products. In a multilevel marketing system, the company manufactures or purchases product and sells it to distributors, who purchase the product at a discount and make money by selling it to the public at retail price. Distributors receive bonuses

by signing up other distributors to sell product. Distributors who have recruited new distributors also receive bonuses as a

result of sales by distributors beneath them in the "downline." Individuals at the top of a Neways downline could make between $25,000 and $35,000 per month. The Mowers had a downline in Neways U.S. called "Base of the Tree," and a distributorship in Neways U.S. called "Mower Partnership."

Thomas Mower was the president of Neways US, and he was in charge of running the company — "the go-to person." Neways employees regularly discussed the financial status of the company with him, and he made most of the decisions for Neways US. Randy Lindstrom, a former general manager of Neways US, testified that Thomas Mower had a basic understanding of accounting, as evidenced by their conversations about income and expenses. According to Lindstrom, Thomas Mower "didn't like to pay taxes."

Leslie Mower also made decisions on a daily basis for Neways US, although she dealt more with distributors than with sales. In the early 1990s, she had virtually no involvement with the financial side of the business. Later, for a period during the mid-1990s, she became Chief Financial Officer of Neways US,[fn2] even though she did not have any expertise in accounting or finance, and she had some difficulty understanding the company's financial statements. She would sometimes pay the corporation's bills, but she

mostly just promoted the product.

Because of its rapid growth in the early 1990s, Neways U.S. was very heavily indebted to creditors and needed money for operating expenses. The Mowers did not want to borrow working capital from a bank, so they instead tried to solve the company's money problems by bringing in cash from Neways Australia. Thomas Mower began meeting with his attorneys to determine how to get money out of Neways Australia without paying taxes on it. Soon, Neways U.S. began receiving hundreds of thousands of dollars from Neways Australia, which Neways U.S. recorded as pre-payment for product that it later sent to Neways Australia. In addition to these pre-payments, Neways U.S. received other amounts from Neways Australia that it classified as loans.

Neways Australia had two primary bank accounts: an operating account and a bonus checking account. It paid for its day-to-day operations — including bills, payments for product, salaries, and royalty payments to Neways US — from its operating account. Every month, it paid distributor bonuses from the bonus checking account. When examined, the books and records at Neways Australia were found to be in poor condition.

At the top of the Neways Australia downline were seven distributorships: Images, Inc. 1 through 7, which later became Neways, Inc. 1 through 7, and then Mower Properties, Inc. 1 through 7.[fn3] Marija Lee, a former employee at Neways Australia and Neways Malaysia, testified that John Hunter, the then-CEO of

Neways Australia, asked her to place these distributorships at the top of the Neways Australia downline. Thomas Mower had originally wanted to set up the Neways Australia downline like the Neways U.S. downline, but John Hunter advised him to create these seven entities to absorb more bonus

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payments than one entity alone could absorb. These amounts are known in the industry as "breakage." The Neways 1 through 7 distributorships did not have to sell product to receive commissions, and they were structured to absorb any bonuses that would otherwise flow up to the company itself. Mr. Hunter had several conversations with Thomas Mower regarding Neways 1 through 7, and the need for Neways U.S. to get money from Neways Australia. He assumed the commission payments to Neways 1 through 7 were going to Neways US, because that was why they set up Neways 1 through 7 in the first place. The Neways 1 through 7 entities received commission checks and later, wire transfers, from Neways Australia's bonus checking account. On its books and records, Neways Australia treated these payments as expenses.

Michael Cunningham, a former CEO of Neways Australia, did not know what happened to the commission checks for the Neways 1 through 7 entities after Neways Australia sent the checks to Utah. Marija Lee testified that she sent them to Utah, and none of the checks were ever voided. John Hunter testified that he sent the checks directly to Thomas and Leslie Mower in Utah, although he had no idea what

happened to them after they reached the United States. When the checks were late a couple of times, Leslie Mower called Mr. Hunter to ask whether they had been mailed. Once, when the Mowers visited Australia, they asked Mr. Hunter to sign some of the checks over to cash, and he obliged.

Neways 1 through 7 distributorships were also set up at the top of the Neways Malaysia downline, and Neways Malaysia sent the commission checks for these distributorships to the United States. At trial, the government introduced commission checks from Neways Malaysia to several of the Neways 1 through 7 distributorships in 1994 and 1995, as well as registers of commission checks from Neways Malaysia for 1996 and 1997. In 1996, the register showed commission checks issued to Neways 1 through 7, as well as Mower Properties 1 through 7, and these entities had the same identification numbers.[fn4] In 1997, the register showed checks to five other entities with these same identification numbers: Rezults, N. Trust, N. Properties, Eclat, and CC Corp.

Patricia Sandberg, Thomas Mower's former secretary, testified that the Mowers had distributorships in Australia and Malaysia, and she saw checks from these distributorships. Commission checks from Australia and Malaysia arrived once a month through the mail, in envelopes addressed to Thomas Mower personally. A downline report accompanied the checks, and the checks corresponded to amounts on the downline report. Ms. Sandberg understood the commission checks to be from distributorships that the Mowers had in Neways

Australia and Neways Malaysia. Usually, she gave the checks to Thomas Mower; sometimes, he gave them back, and she deposited them in an account for "Rezults," per his instructions. Thomas Mower always had the checkbook for the Rezults account in his possession, and he had signatory authority over the account. Neways U.S. had no records for this account. Ms. Sandberg did not know what the Rezults account was used for, but she thought some of the money may have gone toward the purchase of a warehouse constructed for Neways US. The corporate

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accounting department at Neways U.S. never saw the commission checks from Australia and Malaysia, never came to ask about them, and never knew that she deposited them. Annette Jenkins, who worked in the accounting department until 1998, testified that, to her knowledge, Neways U.S. never received any commission checks.

Patricia Sandberg also identified several commission checks from Neways US, payable to the following people and entities: Thomas Mower; Neways Independent Distributorship Adpool; Base of the Tree; Brett Mower[fn5]; Lead Allocation, Darrid; MP Trust; Orphanage; MP Enterprises; and BW Enterprises. All of these were endorsed, in some capacity, by Thomas or Leslie Mower, or in Thomas or Leslie Mower's handwriting. In addition, David Bevans, who worked in the IT department at Neways U.S. in 1996 and 1997, testified that he gave bonus reports to Leslie Mower and that she would sometimes stop by the IT

department to pick up distributor checks, asking, "Are my checks ready?"

Another entity, Mower Properties, Inc., was the property holding company for Neways US. Neways U.S. leased much of its real property from Mower Properties, including a manufacturing facility, office space, and a warehouse. Karin Lane, who worked in the Neways U.S. accounting department, testified that she did the accounting work for Mower Properties. During the years 1994, 1995, and 1996, the Mower Properties bank account received monies via wire transfer from Neways Australia. Ms. Lane thought they were loans or loan proceeds from Australia, and she treated them as such on Mower Properties' financial records. Between October 17, 1994, and July 17, 1996, a total of $736,759 was wired from Neways Australia into the Mower Properties account.

In 1993 or 1994, the Mowers purchased a property called Hobble Creek. David Simpson, the real estate broker for the transaction, testified that he dealt mostly with Thomas Mower. The purchase price for the property was $650,000, of which the Mowers paid $141,621 as a down payment. They paid the remaining $508,379 of the balance within one year of the purchase. The Mowers paid for the property using checks in U.S., Australian, and Malaysian currency, so the parties to the transaction set up a trust account at First Security Bank. The Mowers would deposit the checks into the trust account, and the bank would convert the amounts to U.S. dollars and issue a new check to the sellers of the property. Almost all of the Mowers' checks were Australian or Malaysian

commission checks payable to the Neways 1 through 7 entities. One of the checks was a U.S. commission check for $54,427.56, payable to Thomas Mower. Mr. Simpson testified that he would pick up the checks from Thomas Mower personally, and not from anyone in corporate accounting at Neways US. The warranty deed for the property stated that the sellers "hereby convey and warrant to Thomas Mower, trustee of the Mower Family Trust." The Mower Family Trust is a trust controlled by several members of the Mower family, and the Mowers' personal residence was held by the Mower Family Trust.

John Hunter learned about Hobble Creek in 1994. Thomas Mower told him that it was a piece of property they were going to acquire, and he wanted to build a new house on the property, in part because he wanted room to display full-sized animal trophies. Leslie Mower also wanted to move, because she wanted more space for her horses. John Hunter did not know how the property was ultimately used, and

he testified that multi-level marketing companies sometimes purchase recreational properties. David Simpson testified that Thomas Mower talked about building a house on the property, although Thomas Mower also stated that he wanted to use the property for corporate retreats and to entertain corporate guests. There was no house on the property at the time of sale, and no house was built after the sale.[fn6] The property was eventually used for some corporate functions.

On March 27, 1997, Agent Elder of the IRS arrived at the Neways U.S. headquarters, looking for Thomas Mower. Patricia Sandberg and Agent Elder testified that Ms. Sandberg was the only person present when Agent Elder arrived, and she told him that Thomas Mower was unavailable. Allen Davis testified, on the other hand, that when the IRS arrived, the legal department was notified, and he went to the lobby with James Thompson to meet with Agent Elder. James Thompson, who was then an attorney for Neways US, told Agent Elder that Thomas Mower was not present — which was untrue — and that they could set up a meeting for a later time. After Agent Elder left, James Thompson and Allen Davis went to Thomas Mower's office and told him that the IRS was investigating. They informed Thomas Mower that he could either cooperate or refuse to cooperate, and he told them to cooperate.

Thomas Mower also told Allen Davis and James Thompson that Hobble Creek might be an issue. Allen Davis and James Thompson began searching the legal and accounting records for documentation of the purchase. They did not find anything, but they knew it had been purchased with funds from Australia. Prior to Agent Elder returning a second time, they called Mr. Cunningham in Australia to try to determine the details of the transaction and whether there was any supporting documentation* Thomas Mower participated in the call. Mr. Cunningham informed them that the monies used to purchase Hobble Creek were commission payments, not a loan. Thomas Mower disagreed with this assessment; he believed that the monies were a loan from Neways Australia and that

Neways Australia had recorded them incorrectly.

Before Agent Elder returned, Allen Davis, James Thompson, and Thomas Mower discussed whether there was any documentation of a loan from Neways Australia for the purchase of Hobble Creek. When they could find none, James Thompson decided to create a document to support the loan. The document that he created, however, was back-dated to January 6, 1994. Thomas Mower signed the loan document, which stated that Neways Australia had loaned $650,000 to the Mower Family Trust for the purchase of Hobble Creek.

When Agent Elder returned, he met with Thomas Mower, Allen Davis, and James Thompson. Thomas Mower told Agent Elder that he did not have any distributorships in the Neways U.S. downline. He told Agent Elder that he did not receive any checks for any distributorships, and that he left with the company any monies to which he might be entitled. He also stated that he did not know what MP Trust was. Although Thomas Mower disclosed several individual and corporate bank accounts to Agent Elder, he did not mention the Rezults account.

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Thomas Mower also told Agent Elder that Hobble Creek had been purchased with a loan from Neways Australia. When Agent Elder asked for documentation, James Thompson and Allen Davis left the room to retrieve the newly created loan document. Upon their return, James Thompson handed a folder to

Thomas Mower, who reviewed the loan document and handed the folder to Agent Elder. No one told Agent Elder that the loan document was back-dated. Allen Davis later told Leslie Mower about the back-dated loan document, and he continued to keep Leslie Mower apprised of the situation, although she was not directly involved in it.

After the meeting, Allen Davis and James Thompson continued searching for documentation, and they attempted to gather additional information from the accounting department and Neways Australia. They, continued to have phone conversations with Michael Cunningham in Australia, and they kept Leslie Mower apprised of what was happening. They verified that Neways Australia had treated the Hobble Creek monies as commission payments, rather than as a loan. They determined that, because the property was in the name of the Mower Family Trust, and because they believed that Thomas Mower was the payee on the commission checks, the income was personal income to the Mowers, and the Mowers needed to amend their individual income tax returns.

For his part, Agent Elder traveled to Australia to investigate the payments made by Neways Australia. Thomas Mower gave him permission to review the books of Neways Australia, but no one informed Agent Elder that there was actually no Hobble Creek loan. On October 31, 1997, Allen Davis wrote a letter to Agent Elder, informing him that Neways Australia had not properly recorded the money as a loan, and that they were amending the Neways. U.S. corporate tax returns to reflect the amounts. This

letter was the first time anyone informed Agent Elder that Neways Australia might not have recorded these monies as a loan, or that Hobble Creek was an asset of Neways U.S. rather than the Mower Family Trust. During his investigation at Neways Australia, Agent Elder found no evidence that a loan had been made to anyone — including the Mower Family Trust, Mower Properties, or the Mowers personally. When he returned from Australia, he told Allen Davis that Neways Australia had not recorded the payments as a loan. He also interviewed Leslie Mower sometime in 1998, and she told him that she directed the financial operations of Neways U.S. and that anything financial at Neways U.S. would have to go through her.

Meanwhile, in the aftermath of the meeting with Agent Elder, James Thompson contacted Agent Elder and left two telephone messages on his answering machine. The first was on April 4, 1997, and stated:

> Hello, this is James Thompson, calling, uh . . . uh . . . on behalf of Tom Mower, uh . . . we have been going through documents and-and things that . . . trying to get whatever else might be available in this matter. Uhm, I thought I should call you and just talk to you. Basically to let you know that, uhm . . . uh . . . we have been unable to find anything new, uhm . . . I'm not sure what we would be looking for new. Uhm, I believe you have everything, uhm . . . apparently what happened, what you thought happened did happen, uh, the checks came, uhm . .

> . he signed them over directly, uh-uhm . . . got the loan from the, uh . . . Australian organization and, uh . . . must pay that back,

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> uh . . . within five years thereof, I believe that answers all your questions, uhm . . . we've gone through everything and haven't been able to find anything more. So . . . I'm not sure what more we would, be looking for at this point. But if there's something specifically . . . uh, that you want us to find on that deal, let us know, but-but actually that pretty much covers it, I think. So, if you'll call me back at four two three twenty-eight hundred (423-2800), again, this is James Thompson and, uh . . . and we'll see where we need to go. Okay? Thanks a lot, bye-bye.

Tr. at 705-09; Gov't Ex. 21-5, 21-5A. The second message was on April 8, 1997, and stated:

> Hi, Ted. James Thompson here. Uhm . . . I was just looking over the file again, uh . . . we've been running around seeing if we can't find anymore documents and we've been unable to do so . . . uh, just like the message I left you the other day. I'm not sure what else that we might be looking for that would interest you. Uhm

. . . so far we just have not found any other documents. So, if you could let me know what you prefer as you know we're . . . we have several summonses that, uh . . . that would be quite burden-some if we tried to produce all of that information and you did mention there were other properties that you might be interested in getting information on, but as I understood it, as you left, really you wanted to focus on the Hobble Creek property and so that's what we've been focusing on and I got the feeling from you that . . . that if you were satisfied, uhm . . . about the facts surrounding that, that you wouldn't . . . that you wouldn't really care to, uh . . . make us dig into everything else, uh . . . so I haven't, I haven't dug into anything else yet. But I wanted you to know that I'm not just ignoring you, that, uh . . . that I want to do whatever you . . . want to do on this. Because you're within your right to ask for certain information, but, uh . . . just because of the burden, I hope to avoid it. So, you let me know if you would. I'm, again, James Thompson at four two three twenty-eight hundred (423-2800). Uh, and again . . . I assume, you know, this is the . . . uh . . . (CHUCKLES) . . . the Tom Mower matter and, uh . . . if there's anything I can do, let me know, but I don't want to just keep you hanging out there, all right? Thanks a lot. Bye-bye.

Tr. at 705-09; Gov't Ex. 21-5, 21-5A. Agent Elder testified that he viewed these messages as an attempt by James Thompson to represent that they had given him everything, and that he did not need to investigate further.

For his part, Michael Cunningham testified that he participated in a conference call with Thomas Mower, Allen Davis, and Karin Lane, in which Thomas Mower asked Mr. Cunningham if Neways Australia had any documentation for a loan from the Mowers to Neways Australia.[fn7] Ms. Lane also sent a fax to Neways Australia on October 13, 1997, inquiring as to whether they had found any documentation for a loan. John Dwyer, an in-house accountant

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at Neways Australia, prepared a response, dated October 17, 1997, in which he stated:

> All payments from [Neways Australia] to Thomas Mower are for BONUSES for the Mower downline paid from the MLM system. To my knowledge no Loan was made to Neways Australia and the majority of the payments listed were not Loan repayments but are BONUS payments for the Mower Australian downline.

Tr. at 213, 215, 421-22; Gov't Ex. 20-13.[fn8] In addition, Mr. Cunningham testified that he was not

aware of any loans between Neways Australia and the Mowers personally, or between Neways Australia and the Mower Family Trust or Mower Properties. John Hunter similarly testified that Neways Australia never loaned money to the Mowers individually, or to the Mower Family Trust, Mower Properties, or Neways 1 through 7. Moreover, Mr. Hunter testified that Neways Australia would not have made loan payments with commission checks.

Karin Lane likewise testified about the conference call and the alleged loan. Part of the conference call dealt with the characterization of the monies wired to the Mower Properties account. She originally thought that these were loan proceeds, but Mr. Cunningham told her that they were distributor income. She realized that she had incorrectly characterized the monies on Mower Properties' tax returns and that she would have to amend the returns. However, the returns were never amended.

After Ms. Lane received the fax from John Dwyer, she decided to amend the Mowers' individual income tax returns to include the monies wired to the Mower Properties account. These monies included $44,209.59 in 1994, $449,095.13 in 1995, and $328,593.15 in 1996, for a total of approximately $821,897. Ms. Lane also found a check for $54,427, dated March 20, 1994, and payable to Thomas Mower, which she included in the Mowers' income. From this information, a hired accounting firm prepared 1040Xs for the years 1994, 1995, and 1996, stating that the Mowers' owed $39,220, $181,177, and $128,841 in taxes, penalties, and interest for those years,

respectively. A later review by the IRS indicated that the amended returns primarily addressed payments made to the Mower Properties account.

The Mowers, however, never filed the amended individual income tax returns. Thomas Mower decided not to file them, and Allen Davis told Karin Lane that the beneficiary of the monies was actually Neways US, and not Mower Properties or the Mowers personally. Allen Davis testified that he had originally thought that Thomas Mower was the payee on the commission checks. This was actually not the case, and when Allen Davis discovered that the payees were the Neways 1 through 7 entities, he recommended to Thomas Mower that the Mowers not file the amended individual returns. Instead, Thomas Mower decided to file amended corporate returns for Neways US, reporting additional income of $283,934.30 for 1994 and $247,233.18 for 1995. They filed the returns in early 1998, and paid the taxes, penalties, and interest owing on the additional income. Thomas Mower remained adamant, though, that the monies were loans and not commissions. Allen Davis

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informed Leslie Mower about these decisions, and she signed amended corporate returns for Neways U.S. on January 6, 1998

Karin Lane testified that, even though certain monies were wired directly into the Mower Properties account, they submitted the amended corporate tax returns for Neways U.S. to account for these monies

because Neways U.S. was the actual beneficiary — and the amounts were loans from Neways U.S. to Mower Properties. When she filed the amended returns for Neways US, Karin Lane did not yet know about certain other monies. For instance, she did not know about the Rezults account. She did not know about Hobble Creek. She did not know about the commission checks from Neways Malaysia or from Neways Australia. Eventually, when she found out about Rezults and Hobble Creek, she had to ask the accounting firm to prepare another set of amended returns.

Finally, Ms. Lane testified that, when she was preparing the Mowers' individual income tax returns, Leslie Mower informed her that the Mowers had a downline called MP Trust, listed under Thomas Mower's Social Security number. Leslie Mower told Karin Lane that the Mowers received monies from MP Enterprises, Base of the Tree, Revenol, Employee Purchases, BP Sales, and BW Enterprises. Additionally, Ms. Lane discovered that sometimes the Mowers would not cash their distributor checks, particularly if the company was having money troubles, and the Mowers paid some of Neways US's and Mower Properties' bills from the Mowers' personal checking account. Ms. Lane also testified that the Mowers had loaned a lot of money to Mower Properties, that the accounting staff knew about these monies and treated them as loans, and that, when the Mowers received payments from Mower Properties, the payment amounts were subtracted from the loan amounts. Ms. Lane identified several checks and deposited items, payable to Thomas Mower or MP Trust, that had been deposited in the Mower

Properties account and had been treated as loans from the Mowers to Mower Properties. These deposits totaled $411,536.91 from 1994 to 1997. Ms. Lane admitted, though, that other deposits into the Mower Properties account during the same time period were commission income that no one had reported.

The government devoted substantial time at trial to the testimony of its expert, IRS Agent Renae Trask. Agent Trask compiled checks, deposit slips, and bank records, and she created summaries of all of the commission checks that the government could discover and that the government alleged were personal income to the Mowers. At least one piece of evidence supported each item listed on the summaries, and she converted amounts in Australian or Malaysian currency to U.S. dollars using the conversion rate at the time of each transaction. Exhibit 81-1 listed all of the checks and wire transfers that the government had been able to discover, and it included all of the information from each transaction: the check date, payor, check number, payee, amount (in U.S. dollars), disposition (if known), disposition date, endorsement (if any), and exhibit number.

Exhibit 80-3 summarized all of the amounts by year and listed the total commission income for each year from each country, the commissions reported by the Mowers on their tax returns, and the total unreported commissions. Agent Trask testified that, in creating this exhibit, she assumed the commissions were the Mowers' personal income. She believed this was a valid assumption for many reasons, including: (1) Thomas Mower originally

wanted the Neways Australia commission checks made out to him personally, and John Hunter suggested the Neways 1 through 7 entities as an alternative; (2) all of the Neways 1 through 7 checks were pulled and sent to Utah, addressed to the attention of Thomas and Leslie Mower; (3) the Neways U.S. accounting department was unaware of these checks; (4) Hobble Creek was purchased with these funds, and it was owned by the Mower Family Trust; (5) all of the funds were disposed of at Thomas Mower's direction; (6) no one at Neways U.S. knew this money existed until the IRS began investigating in 1997; (7) John Dwyer's letter stated that these were "BONUSES for the Mower downline"; (8) these were clearly commission checks, and not loans; and (9) John Hunter personally handed some checks to the Mowers and signed them over to cash. For 1992, she calculated the unreported commissions to be $179,362; for 1993, $512,606; for 1994, $1,028,455; for 1995, $555,648; for 1996, $536,711; and for 1997, $397,033. The unreported commissions totaled $3,209,815.[fn9] In 1996 alone, the Mowers reported only half of the commission income that they received from Neways US, and none of the commission income that they received from either Neways Australia or Neways Malaysia. Ultimately, Agent Trask calculated the total tax due and owing as $1,262,081.

Other exhibits detailed specific dispositions of commission checks. Exhibit 81-5 summarized a series of deposits on July 27, 1994, into Leslie Mower's savings account, all from checks dated June 20, 1994,

and made out to Neways 2, 4, 5, 6, and 7. These amounts totaled $55,302.83. Agent Trask did not believe that the Mowers had made a mistake in depositing these amounts in Leslie Mower's savings account, although the defendants introduced evidence showing that, in January 1995, the Mowers transferred $20,000 from this account into the Mower Properties checking account and $40,000 from this account into the Neways U.S. corporate account. Exhibit 100-1 showed how the payee names on the commission checks changed over time from 1992 to 1998. Many of the entities listed as payees on the commission checks — including Neways Independent Distributor Ad Pool, Base of the Tree, MP Enterprises, BP Sales International, BW Enterprises, Rezults, and the Mower Family Trust — had never paid federal taxes. Moreover, two bank accounts — the Mowers' personal checking account and the Rezults account — had been opened using Social Security numbers for two of the Mowers' children.[fn10]

Exhibits 100-2 and 100-3 summarized the disposition of the Neways Australia and Neways Malaysia checks, respectively, between 1994 and 1997. Exhibit 100-4 summarized all commission income from all three entities — Neways US, Neways Australia, and Neways Malaysia — between 1992 and 1997. A total of $712,111 was listed as "unknown" on the summary, and it consisted mostly of Australian commission checks for which the government did not know the ultimate disposition. Of the approximately $2.3 million in commission income from Neways Australia between 1992 and 1997, no person or entity reported any of it before the IRS began investigating.

At the close of the government's evidence, the defendants moved for a judgment of acquittal under Fed.R.Crim.P. 29, but the district court denied the motion. The defendants then called two witnesses: Wade Winegar, a former general counsel at Neways US, and E. Gail Anger, an expert witness.

Mr. Winegar testified that, when he began working in the legal department at Neways U.S. in 1999, he found a lot of corporate structures that various people had set up over the years, and the Mowers did not understand this set up — they just followed their attorneys' advice. The Mowers viewed all of the structures as one "big ball of wax," and they did not view the corporate structures as separate legal entities. Money flowed freely between the different corporations, and although these transfers should have been treated as inter-company loans, no documentation supported this treatment. The Mowers had intended Mower Properties to be a real estate holding company for all of the other companies, and Mower Properties paid the property taxes on the different properties. The Mowers, though, had not run Mower Properties as a separate legal entity, and the properties had been titled in many different names.

As for Hobble Creek, Mr. Winegar testified that he gathered information about the property and was told that it was a retreat for Neways US, where the company would host distributors and customers. He found verification, including pictures and videotapes in the marketing department at Neways US, and he saw

plans for a distributor lodge on Hobble Creek. John Dwyer told him that the checks used to purchase Hobble Creek had come from a payment stream assigned to Mower Properties. A number of payment streams came from Neways Australia, and people at Neways U.S. kept getting confused about whether payments were distributor commissions or pre-payments for product. Also, Hobble Creek was kept on the books of Mower Properties, although Mr. Winegar admitted that it did not appear on Mower Properties' financial statements for 1993, 1994, 1995, or 1996. In 2003, Mr. Winegar re-titled Hobble Creek from the Mower Family Trust to Mower Properties.

The defendants' expert, E. Gail Anger, worked to rebut the testimony of Agent Trask. He disagreed with Agent Trask's conclusion that the commissions were personal income to the Mowers. He stated that nothing in the bonus histories indicated that the Hobble Creek monies were personal to the Mowers, and just because the checks were sent to the Mowers in Utah, and the property was titled in the name of the Mower Family Trust, did not make the Hobble Creek monies personal income. According to Mr. Anger, Mower Properties had "the burdens and benefits of ownership," and Hobble Creek was therefore, corporate property. The great bulk of the checks from Neways Australia and Neways Malaysia, moreover, were not payable to the Mowers personally. In addition, the unidentified checks were never negotiated, and most of the expenses paid out of the Rezults account were corporate expenses. Mr. Anger also testified that, eventually, all of the unreported items identified by the government — except the checks that were not negotiated — were

reported on amended corporate income tax returns for the various companies.

On cross-examination, though, Mr. Anger admitted that Agent Trask had "a reasonable argument," even if he disagreed with her. He also admitted that no one ever reported any of the $3.2 million in any originally filed tax returns, and that Neways U.S. should not have been the entity amending its returns if the income

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was the income of Mower Properties. Further, he admitted that the accountants at Neways U.S. should have known about the money if it was corporate income.

At the close of the evidence, the defendants renewed their motions for acquittal, which the district court denied. After the jury was instructed and the case submitted, the jury found all three defendants guilty on all counts. Subsequently, Thomas Mower and Leslie Mower renewed their motions for acquittal, or in the alternative, for a new trial, and James Thompson renewed his motion for acquittal. The district court denied the motions.

Prior to sentencing, the district court held a hearing pursuant to U.S.S.G. § 6A1.3, at which the parties presented their proposed tax loss findings for sentencing. The district court then issued its tax loss findings. After detailing the evidence and its own findings of fact, the district court calculated Thomas

Mower's tax loss to be $199,775. Under U.S.S.G. § 2T4.1 (2005), the base level for this tax loss amount was 16. The district court calculated Leslie Mower's tax loss to be $89,112, which also resulted in a base level of 16 under U.S.S.G. § 2T4.1 (2005).

At the sentencing hearing on September 13, 2006, the district court sentenced Thomas Mower first. The district court determined that there were overt acts after 2001, so the 2001 Guidelines applied. The court increased Thomas Mower's base level by 2 for sophisticated means, see U.S.S.G. § 2T1.1(b)(2), and by 2 for playing a leading role, *see* U.S.S.G. § 3B 1.1(c), for a total offense level of 20. Combined with a criminal history category of I, this yielded a Guidelines range of 33 to 41 months, and the district court sentenced Thomas Mower to 33 months' imprisonment, followed by 36 months of supervised release.

The district court also applied the 2001 Guidelines for Leslie Mower, despite her counsel's argument that the 1997 Guidelines were appropriate. The court increased her base level by 2 for sophisticated means, *see* U.S.S.G. § 2T1.1(b)(2), resulting in a total offense level of 18, which combined with a criminal history category of I for a Guidelines range of 27 to 33 months. The district court sentenced her to 27 months' imprisonment, followed by 36 months of supervised release.

Lastly, the district court sentenced James Thompson to a term of imprisonment for 12 months and a day, followed by 24 months of supervised release.

II.

Sufficiency of the evidence

On appeal, all three defendants challenge the sufficiency of the evidence to support their convictions. Thomas Mower challenges the sufficiency of the evidence as to his conviction for tax evasion for the years 1992, 1993, and 1997. Leslie Mower challenges the sufficiency of the evidence as to all counts — conspiracy to defraud the United States, and tax evasion for the years 1992 through 1997. James Thompson challenges the sufficiency of the evidence as to both counts — conspiracy to defraud the United States, and corruptly endeavoring to interfere with the administration of internal revenue laws.

"'Evidence is sufficient to support a conviction if a reasonable jury could find the defendant guilty beyond a reasonable doubt, given the direct and circumstantial evidence, along with reasonable inferences therefrom, taken in a light most favorable to the government.'" *United States v. Nelson*, 383 F.3d 1227, 1229 (10th Cir.2004) (quoting *United States v. Wilson*, 107 F.3d 774, 778 (10th Cir.1997)). "We

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will not weigh conflicting evidence or second-guess the fact-finding decisions of the jury." *United States v. Summers*, 414 F.3d 1287, 1293 (10th Cir.2005). "Rather than examining the evidence in `bits and pieces,' we evaluate the sufficiency of the evidence by `considering the collective inferences to be drawn from

the evidence as a whole.'" *Nelson*, 383 F.3d at 1229 (quoting *Wilson*, 107 F.3d at 778).

As a preliminary matter, both Thomas and Leslie Mower rely heavily on the district court's tax loss findings at sentencing in attacking the sufficiency of the evidence to support their convictions. The tax loss findings, however, do not alter our sufficiency review for three reasons. First, the district court's determination of a tax loss for sentencing purposes and the jury's determination of guilt based upon the sufficiency of the evidence are different and distinct inquiries. *See, e.g., United States v. Greene*, 239 Fed.Appx. 431, 447 (10th Cir.2007) (rejecting the defendant's argument that the district court was prohibited from calculating the tax loss based upon facts found at sentencing); *United States v. Kosinski* 480 F.3d 769, 776 (6th Cir.2007). Granted, in most instances, this distinction becomes relevant where a district court has calculated a greater tax loss than that found by the jury at trial, but there is no reason to blur the two inquiries when the converse situation is presented. *Cf. United States v. Scholl*, 166 F.3d 964, 981 (9th Cir.1999) (holding that the district court did not err in finding, during sentencing, that "there was insufficient evidence to make a reasonable estimate of tax loss," where the jury convicted the defendant of violating 26 U.S.C. § 7206(1)). Second, in the instant case, the district court denied the Mowers' respective post-verdict motions for judgment of acquittal, indicating the district court thought that the evidence was sufficient to support the jury's verdicts, notwithstanding the district court's later tax loss findings. Third, given the evidence outlined above, the

district court would have been justified in calculating a greater tax loss than it did. In analyzing the Mowers' sufficiency of the evidence claims, therefore, we will disregard the district court's tax loss findings and employ our usual sufficiency of the evidence analysis by reviewing the evidence presented at trial to determine "if a reasonable jury could find the defendant guilty beyond a reasonable doubt, given the direct and circumstantial evidence, along with reasonable inferences therefrom, taken in a light most favorable to the government." *Nelson*, 383 F.3d at 1229 (citation and internal quotation marks omitted).

A. *Thomas Mower*

The evidence was sufficient to convict Thomas Mower of tax evasion for the years 1992, 1993, and 1997. He has chosen to appeal these years — and not 1994, 1995, and 1996 — because in 1992, 1993, and 1997, the only alleged unreported income was foreign commission income, as opposed to a combination of domestic and foreign commission income. "In order to prove a defendant guilty of tax evasion, the government must show (1), a substantial tax liability, (2) willfulness, and (3) an affirmative act constituting evasion or attempted evasion." *United States v. Anderson*, 319 F.3d 1218, 1219 (10th Cir.2003); *see also* 26 U.S.C. § 7201 ("Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall . . . be guilty of a felony. . . ."). In proving tax evasion, the government's evidence

> is ordinarily circumstantial, since direct

> proof is often unavailable. Circumstantial evidence in this context may consist of, among other things, a failure to report a substantial amount of income, a

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> consistent pattern of underreporting large amounts of income, the spending of large amounts of cash that cannot be reconciled with the amount of reported income, or any conduct, the likely effect of which would be to mislead or to conceal.

United States v. Kim, 884 F.2d 189, 192 (5th Cir.1989) (citations and internal quotation marks omitted).

A reasonable jury could have found beyond a reasonable doubt that Thomas Mower had a substantial tax liability for the years 1992, 1993, and 1997. In 1992, several Australian checks, payable to Images 1 through 7, were drawn on the Australian National Bank. One of these checks contained a handwritten note on the front with the words, "Please Pay Cash." John Hunter testified that, when the Mowers visited Australia, they once asked him to sign commission checks over to cash, and he obliged. In addition, the government discovered multiple commission checks from 1992 that had an "unknown disposition." Although the Mowers presented evidence at trial that these checks were not negotiated, the receipt of the checks — and not their negotiation — is the important fact in determining whether income is taxable in a given year. *See Walter v. United States*,

148 F.3d 1027, 1028-29 (8th Cir. 1998) (explaining, under the theory of constructive receipt, that a lost check was still taxable in the year it was received, even though the defendants did not obtain or cash a replacement check until two years later); *see also* 26 C.F.R. 1.451-2. For the doctrine of constructive receipt to apply, the checks must have been personal income to the Mowers, but as explained below, there was more than enough evidence for a reasonable jury to conclude that they were.[fn11]

As regards 1993, the government produced evidence of a variety of foreign commission checks with a variety of dispositions. Several of the checks were endorsed directly to pay for Hobble Creek. Others were deposited in the Rezults account. Multiple foreign commission checks from 1993 had an "unknown disposition." In 1997, a number of foreign commission checks were deposited in the Mower Properties account, the Rezults account, and the Neways U.S. account.

Most importantly, the evidence indicated that the foreign commission checks were personal income to the Mowers. Thomas Mower originally wanted the Neways Australia commission checks made out to him personally, and he only created the Neways 1 through 7 entities after John Hunter suggested it. All of the foreign commission checks were pulled and sent to Utah, addressed to the attention of Thomas Mower. No one in the corporate accounting department at Neways U.S. was aware of the checks until after the IRS began investigating in 1997. John Hunter personally signed several of the commission checks over to cash and

handed them to the Mowers, and one of the 1992 commission checks has "Please Pay Cash" on the front of it. All of the funds were disposed of at Thomas Mower's direction. No one at Neways US — except for the Mowers and Thomas Mower's secretary — knew of the Rezults account, and the Mowers had control over the account. Several of the checks from 1993 were endorsed directly to pay for Hobble Creek, which was titled in the name of the Mower Family Trust and was where the Mowers had

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planned to build a house Further, no one at Neways U.S. knew about Hobble Creek until after the IRS became involved. Even the false loan document stated that the "loan" for Hobble Creek was to the Mower Family Trust, not to any of the corporations. John Dwyer's letter stated that these were "BONUSES for the Mower downline." Also, despite the Mowers' insistence that these were loans or loan repayments, they were clearly commission checks, and the evidence showed that when the Mowers needed a loan for Neways U.S. from Neways Australia, they knew how to accomplish it — and how to include it on the books of both companies. Most significantly, despite the Mowers' insistence that these monies were corporate income, and not personal income, no person or entity paid any taxes on the $2,384,849 of Australian commission income or the $324,554 of Malaysian commission income until after the IRS began investigating in 1997. Finally, the Mowers continually changed their story as to what these commission checks actually were — loans from Neways Australia,

loan repayments from Neways Australia, income to Neways US, income to Mower Properties, etc. Taken together, the evidence was more than sufficient for the jury to find beyond a reasonable doubt that the commission checks were personal income to the Mowers, for which they incurred a "substantial tax liability." *Anderson*, 319 F.3d at 1219.

Additional evidence — and much of the evidence listed above — showed that Thomas Mower's failure to report these monies was "willful?." *Id.* Asking John Hunter to endorse checks directly to cash shows willfulness as to the 1992 amounts. In addition, Thomas Mower endorsed checks directly to purchase Hobble Creek in 1993, and he presented a false, back-dated loan document to the IRS in an effort to cover up the purchase. He lied to Agent Elder about not having a distributorship in Neways US. Further, the sheer number of shell corporations and entities that the Mowers created here — and which were payees for the various commission checks — is nothing short of astounding, as is the number of different payees indicated on the commission checks, as well as the number of different accounts in which the Mowers deposited all of the commission checks. Along these same lines, the Mowers frequently opened bank accounts under incorrect Social Security or employer identification numbers. From this circumstantial evidence, a reasonable jury, could have found beyond a reasonable doubt that Thomas Mower's failure to report these amounts was willful.

Finally, the evidence showed affirmative acts of evasion for each year. "An affirmative act requires

more than the passive failure to file a tax return; rather, it requires a positive act of commission designed to mislead or conceal." *United States v. Meek*, 998 F.2d 776, 779 (10th Cir.1993). The government only needed to show one affirmative act of evasion for each count of tax evasion, *see Anderson*, 319 F.3d at 1219; *Meek*, 998 F.2d at 779, and here, many of the affirmative acts of evasion related to multiple years. For instance, the creation and presentation of the false, back-dated loan document certainly qualifies as an affirmative act of evasion — arguably for all six years of tax evasion, and at the very least for 1993 and 1994. Later, and long after the IRS began investigating, the Mowers had Neways U.S. file several sets of amended corporate returns, in which they attempted to claim that the commissions were actually corporate income, rather than personal income. A reasonable jury could have found beyond a reasonable doubt that these were affirmative acts of evasion as to the foreign

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commission checks issued in 1992, 1993, and 1997.

In his argument on appeal, Thomas Mower contends that the evidence did not comport with the government's use of the "specific items method" of proving tax evasion. Under the specific items method, "the Government . . . produce[s] evidence of the receipt of specific items of reportable income by the defendant that do not appear on his income tax return or appear in diminished amount." *United States v. Horton*, 526 F.2d 884, 886 (5th Cir.1976) (contrasting this with the "net worth method," whereby the government shows an

"increase in the taxpayer's net worth during the period in question in an amount greater than that reported to IRS"); *see also United Stales v. Merrick*, 464 F.2d 1087, 1092 (10th Cir.1972). Contrary to Thomas Mower's argument, the government's use of the specific items method does not require the government to prove any additional elements beyond those laid out in *Anderson*, 319 F.3d at 1219. Rather, the specific items method merely states the obvious with regard to the government's burden to show a "substantial tax liability" under 26 U.S.C. § 7201: the government must produce evidence of a specific item of reportable income that the defendants did not — but should have — included on their income tax returns. The government has done so in the instant case, and the evidence was sufficient to support Thomas Mower's convictions.

B. *Leslie Mower*

1. *Conspiracy*

There was sufficient evidence for a reasonable jury to find Leslie Mower guilty beyond a reasonable doubt of conspiracy to defraud the United States. The elements of conspiracy under 18 U.S.C. § 371 are "that (1) the defendant entered into an agreement; (2) the agreement involved a violation of the law; (3) one of the members of the conspiracy committed an overt act; (4) the overt act was in furtherance of the conspiracy's object; and (5) the defendant wilfully entered the conspiracy." *United States v. Weidner*, 437 F.3d 1023, 1033 (10th Cir.2006). "Secrecy and concealment are often necessary to a successful conspiracy, and, as a result, direct evidence of the crime is frequently

difficult to obtain." *Id.* Consequently, "conspiracy convictions may be based on circumstantial evidence, and the jury may infer conspiracy from the defendants' conduct and other circumstantial evidence indicating coordination and concert of action." *Id.* (citation and internal quotation marks omitted).

The evidence was sufficient to show that Leslie Mower entered into an agreement to conceal approximately $3.2 million in foreign and domestic commission income. "`The core of a conspiracy is an agreement to commit an unlawful act.'" *Id.* (quoting *United States v. Morehead*, 959 F.2d 1489, 1500 (10th Cir.1992)). "The existence of the agreement to violate the law may be inferred from a `unity of purpose or common design and understanding' among conspirators to accomplish the objects of the conspiracy." *Id.* (quoting *United States v. Kendall*, 766 F.2d 1426, 1431 (10th Cir.1985)). Leslie Mower was the Chief Financial Officer of Neways US. She was aware of the foreign commission checks and knew what they were, and, when the commission checks did not arrive on time, she would call John Hunter to inquire. In her interview with Agent Elder, she told him that she directed the financial operations of Neways U.S. and that anything financial at Neways U.S. would have to go through her. She was with her husband in Australia when they asked John Hunter to sign several of the commission checks over to cash. She often picked up the domestic commission

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checks from Neways US, and her endorsement appears

on several of the domestic commission checks. Several commission checks were deposited into her personal savings account. She never disclosed these payments to anyone at Neways US, including Annette Jenkins and Karin Lane when she asked them to prepare the Mowers' individual income tax returns. She was aware of the purchase of Hobble Creek and told John Hunter that she wanted to build a new house there. In addition, Allen Davis continually kept her apprised of the IRS investigation, including the false loan document that her husband presented to the IRS. Finally, despite all of this, Leslie Mower ultimately signed the amended corporate tax returns that Neways U.S. filed to mislead the IRS after the investigation began.

The totality of this evidence was sufficient to prove beyond a reasonable doubt that Leslie Mower entered into an agreement with her husband to defraud the United States. It was also sufficient to show beyond a reasonable doubt that she entered into the agreement willfully. *See Weidner*, 437 F.3d at 1033. In addition, even though the government only had to prove that one of the members of the conspiracy committed an overt act in furtherance of the conspiracy, *see Id.*, the evidence contained several examples of overt acts committed by Leslie Mower herself. The evidence was sufficient to convict Leslie Mower of conspiracy to defraud the United States.

2. *Tax evasion*

Leslie Mower's challenge to the sufficiency of the evidence also fails with regard to the six counts of tax

evasion. "In order to prove a defendant guilty of tax evasion, the government must show (1) a substantial tax liability, (2) willfulness, and (3) an affirmative act constituting evasion or attempted evasion." *Anderson*, 319 F.3d at 1219.

For the same reasons as her husband, Leslie Mower had a "substantial tax liability" in 1992, 1993, and 1997. In 1994, 1995, and 1996, there was evidence of unreported income from the foreign commission checks, and for those years, the government also produced evidence of unreported domestic commission income. The government's evidence of unreported income in 1994, 1995, and 1996 included: foreign commission checks used to purchase Hobble Creek in 1994; domestic and foreign commission checks deposited in Leslie Mower's savings account in 1994 and 1995; domestic commission checks deposited in the Mowers' checking account in 1994, 1995, and 1996; domestic and foreign commission checks deposited in the Mower Properties account in 1994, 1995, and 1996; domestic and foreign commission checks deposited in the Rezults account in 1994, 1995, and 1996; foreign commission checks drawn on the National Australia Bank in 1994 and 1995; and domestic and foreign commission checks of "unknown disposition" in 1994 and 1996. As explained previously, the evidence was sufficient for a reasonable jury to conclude beyond a reasonable doubt that this was personal income to the Mowers.

In addition, the evidence previously cited as supporting Leslie Mower's conviction for conspiracy to defraud the United States was also sufficient to show

the final two elements for all six counts of tax evasion: "(2) willfulness, and (3) an affirmative act constituting evasion or attempted evasion." *Anderson*, 319 F.3d at 1219. The government presented sufficient evidence for a reasonable jury to convict Leslie Mower of tax evasion for the years 1992 through 1997.

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C. *James Thompson*

1. *Conspiracy*

There was also sufficient evidence to convict James Thompson of conspiracy to defraud the United States, in violation of 18 U.S.C. § 371. The elements of conspiracy are "that (1) the defendant entered into an agreement; (2) the agreement involved a violation of the law; (3) one of the members of the conspiracy committed an overt act; (4) the overt act was in furtherance of the conspiracy's object; and (5) the defendant wilfully entered the conspiracy." *Weidner*, 437 F.3d at 1033. James Thompson was aware that there was no documentation to support treating the monies used to purchase Hobble Creek as a loan, and further, that Neways Australia had not accounted for the monies as a loan. Yet, he decided to create a false, back-dated loan document for the transaction. Then, during Agent Elder's interview, James Thompson brought the false loan document to Thomas Mower, who presented it to Agent Elder. Neither James Thompson nor Thomas Mower informed Agent Elder that the document was back-dated. In addition, James Thompson left two messages on Agent Elder's

answering machine, in which he tried to convince Agent Elder that they had given him all of the information that they had concerning the alleged Hobble Creek loan.

The evidence was sufficient for a reasonable jury to find James Thompson guilty of conspiracy to defraud the United States. His creation of the false, back-dated loan document, which Thomas Mower ultimately signed, and their joint presentation of that document to Agent Elder, showed "a unity of purpose or common design and understanding" between James Thompson and Thomas Mower, from which a reasonable jury could infer an agreement to commit an unlawful act. *Weidner*, 437 F.3d at 1033 (citations and internal quotation marks omitted). In addition, this series of events contained several overt acts in furtherance of the conspiracy, as well as evidence of willfulness. The evidence was sufficient to support James Thompson's conviction for conspiracy.

2. *Obstruction*

The evidence was also sufficient for a reasonable jury to convict James Thompson of corruptly endeavoring to interfere with the administration of internal revenue laws. "In order to establish a violation of 26 U.S.C. § 7212(a), the government must prove that a defendant `corruptly' endeavored to obstruct and impede the due administration of the internal revenue laws." *United States v. Winchell*, 129 F.3d 1093, 1098 (10th Cir.1997). In this context, "to act corruptly means to act with the intent to secure an unlawful benefit either for oneself or for another." *Id.*

James Thompson was aware of the pending IRS investigation. He responded by creating a false, back-dated loan document, which Thomas Mower signed and which they presented to Agent Elder without informing him that it was back-dated. He knew, before creating the false loan document, that no documentation supported treating the Hobble Creek monies as a loan, and that Neways Australia had not accounted for the monies as a loan. In addition, after presenting the false loan document to Agent Elder, he called Agent Elder' and left two messages trying to convince Agent Elder that they had given him all of the information that they had concerning the alleged Hobble Creek loan. This evidence was sufficient for a reasonable jury to find beyond a reasonable doubt that James Thompson "'corruptly' endeavored to obstruct and impede the due administration of the internal revenue laws." *Winchell*, 129 F.3d at 1098.

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Statute of limitations

Leslie Mower and James Thompson contend that the government did not bring several of the charges against them within the applicable statute of limitations.[fn12] Specifically, Leslie Mower contends that the government brought four of the tax evasion charges — for the years 1992, 1993, 1994, and 1995 — outside of the statute of limitations, because the limitations periods began to run when the Mowers filed their personal income tax returns for those years. James Thompson argues that his final phone message to Agent Elder, on April 8, 1997, was not an overt act

in furtherance of the conspiracy and was not an attempt to obstruct or impede the IRS, and, as a result, both counts against him are barred by the applicable statute of limitations.

"We review the district court's interpretation of the statute of limitations de novo." *Anderson*, 319 F.3d at 1219. The limitations period for each count in the Superseding Indictment is six years. *See* 26 U.S.C. § 6531(2), (6), & (8); *United States v. Workinger*, 90 F.3d 1409, 1413-14 (9th Cir.1996).

A. *Leslie Mower*

The district court correctly determined that the government brought the four counts of tax evasion against Leslie Mower within the six-year limitations period. In *Anderson*, 319 F.3d at 1219, we adopted the rule, embraced by many of our sister circuits, "that when a defendant commits a series of evasive acts over several years after incurring a tax liability, the statute of limitations begins to run on the date of the last evasive act." *See also United States v. Wilson*, 118 F.3d 228, 236 (4th Cir.1997); *United States v. Dandy*, 998 F.2d 1344, 1355 (6th Cir.1993); *United States v. Winfield*, 960 F.2d 970, 974 (11th Cir.1992); *United States v. DeTar*, 832 F.2d 1110, 1113 (9th Cir.1987); *United States v. Ferris*, 807 F.2d 269, 270-71 (1st Cir.1986). In so holding, we expressly approved of the First Circuit's reasoning in *Ferris*, explaining:

> Section 7201 criminalizes not just the failure to file a return or the filing of a false return, but the willful attempt to

> evade taxes *in any manner*. In light of the fact that evasive acts following the filing of a return may be considered part of the offense, . . . "it is the date of the latest act of evasion, not the due date of the taxes, that triggers the statute of limitations."

Anderson, 319 F.3d at 1219-20 (citing and quoting *Ferris*, 807 F.2d at 271). We also quoted the Sixth Circuit's explanation that "`to hold otherwise would only reward a defendant for successfully evading discovery of his tax fraud for a period of six years subsequent to the date the returns were filed.'" *Id.* at 1220 (quoting *Dandy*, 998 F.2d at 1355).

An affirmative act of evasion "requires more than the passive failure to file a tax return; rather, it requires a positive act of commission designed to mislead or conceal." *Meek*, 998 F.2d at 779. In the instant case, the Superseding Indictment alleged that, for each count of tax evasion, the filing of the false amended corporate income tax returns for Neways U.S. on January 6, 1998, was an affirmative act of evasion. In its closing argument, the government again contended that this filing was an affirmative act of evasion occurring after December 18, 1996 — i.e., occurring within six years of when the original indictment was returned against Leslie Mower. Moreover, the jury instructions

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explained to the jury that it "must unanimously agree that the affirmative act of evasion occurred on or after

December 18, 1996." Jury Instruction No. 32, ROA, Vol. V, Doc. 188, at 35. The jury's finding that Leslie Mower was guilty, therefore, necessarily meant that it found beyond a reasonable doubt that she committed an affirmative act of evasion after December 18, 1996. Included in the evidence to support this finding was Leslie Mower's signature on the amended corporate income tax returns for Neways US, filed on January 6, 1998. There was sufficient evidence for the jury to conclude that the statute of limitations did not bar Leslie Mower's convictions for tax evasion.

Leslie Mower argues that our decision in *Anderson* was contrary to our prior decision in *United States v. Payne*, 978 F.2d 1177 (10th Cir.1992), and that "the alleged offense is complete and the six year statute of limitations begins to run when a defendant willfully files a false return on the filing date." L.M. Opening Br. at 38. She is incorrect. In *Payne*, 978 F.2d at 1179, we addressed the situation where a defendant had committed an affirmative act of evasion but had not yet incurred a tax deficiency. We explained that, because the crime was not complete until the defendant incurred a tax deficiency, the statute of limitations could not begin to run until that point in time. *Id.* We noted, however, that our holding was consistent with other circuits that had "held that a prosecution under § 7201 is timely if commenced within six years of the last act of evasion," where a defendant incurred a tax deficiency and then committed affirmative acts of evasion. *Id.* at 1179 n. 2. In *Anderson*, 319 F.3d at 1220-21, we relied upon this language in *Payne* to reconcile the two cases, and we explained that, where a defendant has already

incurred a substantial tax deficiency, the statute of limitations begins to run on the date of the last affirmative act of evasion.[fn13]

B. *James Thompson*

The district court correctly determined that the government's charges against James Thompson were not barred by the applicable statute of limitations. For the conspiracy count, the government was required to prove that, within the statute of limitations period, one of the conspirators committed an overt act in furtherance of the conspiracy. *See Grunewald v. United States*, 353 U.S. 391, 396-97, 77 S.Ct. 963, 1 L.Ed.2d 931 (1957). Here, because the Superseding Indictment was returned on April 8, 2003, the jury needed to find that one of the conspirators committed an overt act on or after April 8, 1997, and the district court correctly instructed the jury as to the law on this issue.

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Even if James Thompson's telephone message to Agent Elder on April 8, 1997, when viewed in isolation, may appear innocuous, it came only days after James Thompson and Thomas Mower presented the false Hobble Creek loan document to Agent Elder. Several statements in the telephone message, moreover, indicate that James Thompson was trying to forestall the government's investigation, and Agent Elder testified that he viewed the message as such. In light of its timing and context, a reasonable jury could have found beyond a reasonable doubt that James

Thompson's telephone message to Agent Elder on April 8, 1997, was an overt act in furtherance of the conspiracy.

Further, the government is correct that, because James Thompson did not take the affirmative steps necessary to withdraw from the conspiracy, any of his co-conspirators' overt acts — not just his own acts — may be used to satisfy the statute of limitations as to him. *See United States v. Hauck*, 980 F.2d 611, 614 (10th Cir.1992). Even if we were to conclude, therefore, that the telephone message on April 8, 1997, was not an overt act in furtherance of the conspiracy, any of his co-conspirators' acts in furtherance of the conspiracy, on or after April 8, 1997, brought his conspiracy charge within the statute of limitations.

As for the count of corruptly endeavoring to interfere with the administration of internal revenue laws, the statute of limitations began to run "on the date of the last corrupt act," *Wilson*, 118 F.3d at 236, so the government was required to prove beyond a reasonable doubt that James Thompson committed a corrupt act on or after April 8, 1997. The district court correctly instructed the jury on this issue, and, for reasons similar to those supporting the conspiracy count, a reasonable jury could have found that James Thompson's telephone message was a corrupt act designed to obstruct or impede the IRS investigation.

Summary charts

Thomas and Leslie Mower both contend that the district court abused its discretion and committed

reversible error in admitting the government's "summary charts." Neither of the defendants specifies which particular "summary charts" they are challenging. At a minimum, it appears both defendants are appealing the district court's decision to admit Exhibit 80-3. Some of their argument also appears to challenge the district court's admission of other exhibits.

Regardless of which summary charts the Mowers are appealing, the district court did not abuse its discretion in admitting them. Under the Federal Rules of Evidence,

> [t]he contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.

Fed.R.Evid. 1006. "The admission of summaries under Rule 1006 is within the sound discretion of the trial court," *Harris Mkt. Research v. Marshall Mktg. & Commc'ns, Inc.*, 948 F.2d 1518, 1525 (10th Cir.1991), and we review a district court's decision to admit summary charts under Rule 1006 for an abuse of discretion, *United States v. Samaniego*, 187 F.3d 1222, 1223 (10th Cir.1999). In previous cases, we have approved the use of summaries in tax prosecutions, as

long as the district court provides appropriate limiting instructions. *See, e.g., United States v.*

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Mann, 884 F.2d 532, 539 (10th Cir.1989); *see also United States v. Ray*, 370 F.3d 1039, 1046 (10th Cir.2004) (explaining that "because tax cases often require the presentation of substantial and complex documentation and the technical analyses of these materials by tax experts," summaries are often admissible in tax cases under Rule 1006), *vacated on other grounds*, 543 U.S. 1109, 125 S.Ct. 995, 160 L.Ed.2d 1035 (2005).

In the present case, the district court did not err in admitting the summaries. The government's evidence was incredibly voluminous, and it would have been incomprehensible to the jury without summarization. Agent Trask compiled the summaries from all of the commission payments that the government alleged were personal income to the Mowers. Each item listed on the summaries was supported by at least one piece of evidence, such as a check, deposit slip, bank record, or wire transfer receipt. Exhibit 81-1 listed all of the items in painstaking detail, cross-referencing to each specific exhibit number.

The Mowers are correct that, in compiling the summaries, Agent Trask assumed the items listed were personal income to the Mowers. She believed, however, that this assumption was factually correct, and she explained how the evidence supported it.

Further, the Mowers thoroughly cross-examined Agent Trask concerning the amounts and items listed on the summaries. Moreover, as discussed previously, the evidence supported Agent Trask's contention that these amounts were personal income to the Mowers — even the checks that were never negotiated or were deposited in corporate accounts. Finally, the district court instructed the jury:

> Charts or summaries have been prepared by the government and shown to you during the trial for the purpose of explaining facts that are allegedly contained in books, records, and other documents which are in evidence in the case. Such charts or summaries are not evidence in this trial or proof of any fact. If you find that these charts or summaries to [sic] not correctly reflect facts or figures shown by the evidence in the case, the jury should disregard the charts or summaries.
>
> In other words, such charts or summaries are used only as a matter of convenience for you and to the extent that you find they are not, in truth, accurate summaries of facts or figures shown by the evidence in the case, you can disregard them entirely.

Jury Instruction No. 14, ROA, Vol. V, Doc. 188, at 15. These instructions were sufficient to mitigate any potential prejudice resulting from the admission of the

summaries here. *See United States v. Francis,* 131 F.3d 1452, 1458 (11th Cir.1997). The district court did not abuse its discretion in admitting the summaries.

Grand jury testimony of Allen Davis

Thomas Mower contends that the grand jury testimony of his attorney, Allen Davis, on March 13, 2002, did not provide *prima facie* evidence that Thomas Mower used Mr. Davis to further a crime or fraud, and the district court erred in granting the government's motion to compel Mr. Davis's December 5, 2002, grand jury testimony. Thomas Mower also argues that the district court violated his procedural due process rights by refusing to unseal the transcript of an *ex parte* motion hearing and refusing to compel the production of the government's evidence. He contends that these errors require dismissal of the indictment.

After entering into an immunity agreement with Allen Davis on March 12, 2002, the government subpoenaed Mr. Davis to

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testify before the grand jury on March 13, 2002. Mr. Davis, an attorney at Neways US, began by explaining that he was representing Thomas Mower individually during the IRS investigation. Mr. Davis testified that he met with Thomas Mower, prior to the interview with Agent Elder, to discuss the IRS investigation, but Mr. Davis asserted attorney-client privilege in response to questions about the content of that

meeting. He then identified the loan document for Hobble Creek, and stated that he was present when James Thompson created it, that he was present when it was provided to Agent Elder, and that the Mowers later permitted him to tell Agent Elder that it was a false loan document. He asserted attorney-client privilege, however, in refusing to answer a question about whether he ever had a meeting with Thomas Mower in which they discussed the Hobble Creek loan document. Later, he testified that, after the IRS investigation began, they originally decided to amend the Mowers' individual income tax returns, but Thomas Mower decided not to file them and instead to amend the Neways U.S. corporate returns. Mr. Davis further testified that he talked with Michael Cunningham about the payments from Australia, but he again asserted attorney-client privilege regarding his conversations with Thomas Mower on that subject.

Following Mr. Davis's grand jury testimony, the government filed an *ex parte* motion to compel the testimony of Mr. Davis and two other attorneys. The district court granted the motion, finding:

> A. The government has established a prima facie showing that the alleged crime has some foundation in fact;
>
> B. The government has sustained their burden of showing that the testimony sought is related to the charges under investigation; and
>
> C. The testimony sought is not covered by

> the attorney-client privilege because the purported conversations and documents were in furtherance of a crime or fraud[.]

Order to Compel, T.M. Opening Br. at App'x C, at 1. The district court ordered Mr. Davis and the two attorneys

> to testify before the grand jury to answer questions regarding Thomas Mower and Leslie Mower's failure to report on their U.S. individual income tax return or a U.S. corporate income tax return their commission income earned from Neways U.S., Neways Australia, Neways Malaysia and other Neways entities from 1989 through the present, the preparation of phoney loan documents, the presentation of phoney loan documents to the IRS, the preparation and filing of the Mower's individual income tax returns, the preparation and filing of Neways corporate tax returns, the preparation and filing of Mower Properties tax returns, the preparation and filing of amendments to Neways corporate tax returns, falsification of Neways U.S. and Mower Properties' corporate books and records and other attempts by these attorneys to knowingly or unwittingly further Thomas Mower and Leslie Mower's tax fraud scheme.

Id. at 1-2. Under compulsion from the order, Allen

Davis again appeared before the grand jury on December 5, 2002, and provided answers to questions on the subjects identified in the court's order. In response, Thomas Mower filed a motion to unseal the transcript of the *ex parte* hearing and to compel the production of the evidence that the government provided to the district court in connection with the hearing. The district court denied this motion. Later, Thomas Mower filed a motion to dismiss the indictment, contending that the government's intrusion into his

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attorney-client privilege violated his due process rights. The district court denied this motion as well.

We conclude that Thomas Mower's contentions on appeal do not support dismissal of the indictment. As for his first contention — that the order to compel was unjustified and over-broad under the crime-fraud exception to attorney-client privilege — presumably he is claiming a violation of his due process rights, although it is not entirely clear from his discussion. "We review the denial of Appellant's motion to dismiss the indictment for an abuse of discretion." *United States v. Kingston*, 971 F.2d 481, 490 (10th Cir.1992). In *United States v. Kennedy*, 225 F.3d 1187, 1194 (10th Cir.2000), we explained that, although "[g]overnment intrusions into pre-indictment attorney-client relationships do not implicate the Sixth Amendment,"[fn14] there are instances in which "a defendant may claim his or her rights under the Due Process Clause have been violated by prosecutorial

misconduct occurring prior to indictment." Such a violation only occurs where the "[m]isconduct by law enforcement officials in collecting incriminating evidence . . . is outrageous enough to shock the conscience of the court." *Id.* (citing *Rochin v. California*, 342 U.S. 165, 172-74, 72 S.Ct. 205, 96 L.Ed. 183 (1952)). After noting that "[o]ther courts have concluded governmental misconduct in the form of a pre-indictment invasion of a defendant's attorney-client relationship may, under some circumstances, amount to a deprivation of the defendant's right to due process," we adopted the Third Circuit's test for evaluating such claims:

> [I]n order to raise a colorable claim of outrageousness pertaining to alleged governmental' intrusion into the attorney-client relationship, the defendant's submissions must demonstrate an issue of fact as to each of the three following elements: (1) the government's objective awareness of an ongoing, personal attorney-client relationship between its informant and the defendant; (2) deliberate intrusion into that relationship; and (3) actual and substantial prejudice.

Id. at 1195 (quoting *United States v. Voigt*, 89 F.3d 1050. 1067 (3d Cir.1996)).

Thomas Mower has failed to show that the challenged government conduct — "[t]he government's *ex parte* invocation of the crime/fraud exception to

defendant's attorney-client privilege," T.M. Opening Br. at 40 — caused him any actual and substantial prejudice under the third prong of the *Kennedy* test. In his brief on appeal, Thomas Mower states:

> Among the more damaging disclosures was the disclosure that amended personal tax returns reporting the foreign commissions as the Mowers' personal income had been prepared but never filed. Although those returns were not filed, and the commissions were reported as corporate income instead, the government used the fact that, in a privileged setting, the Mowers and their advisors had first characterized the income, as personal to persuade the jury that the later characterization of the income was fraudulent.

T.M. Opening Br. at 43. Contrary to Thomas Mower's contention, this "damaging disclosure" did not occur during Allen Davis's December 5, 2002, grand jury testimony

as a result of the district court's order to compel. Rather, Mr. Davis discussed these facts in his previous grand jury testimony on March 13, 2002, prior to the government ever seeking the order to compel. Mr. Davis certainly testified about this point on December 5, 2002, but, given his previous testimony, the later testimony hardly qualifies as a "damaging disclosure."

Under the third prong of the *Kennedy* test, Thomas Mower has not shown any "actual and substantial prejudice" resulting from the district court's order to compel — or from "[t]he government's *ex parte* invocation of the crime/fraud exception to defendant's attorney-client privilege" — and there was no deprivation of his due process rights. *See Kennedy*, 225 F.3d at 1195-97.[fn15] As a result, we do not need to address whether attorney-client privilege, or the crime-fraud exception to that privilege, appropriately applied to Mr. Davis's testimony. *See Kingston*, 971 F.2d at 491 n. 5 ("It is unclear whether, in fact, a breach of the attorney-client privilege occurred during the grand jury proceedings. . . . We need not reach th[is] issue . . . because, as stated in the text, Appellant has failed to show prejudice stemming from this alleged violation of the attorney-client privilege.").

Thomas Mower's second contention — that the district court's refusal to unseal the transcript of the *ex parte* hearing and compel the production of the government's evidence violated his procedural due process rights — is likewise unpersuasive. Given the procedural posture of the case, this second contention falls within our due process analysis under the *Kennedy* test, and, as explained above, Thomas Mower has failed to show any "actual and substantial prejudice" under that test. *Kennedy*, 225 F.3d at 1195.

Severance

Both Leslie Mower and James Thompson challenge the district court's decision to deny their respective motions for severance. Leslie Mower argues

that, because of the "overwhelming evidence" at trial against Thomas Mower and James Thompson, it was impossible for the jury to consider only the evidence against her. Likewise, James Thompson argues that he was prejudiced by the great weight of the evidence against the Mowers — especially considering his comparatively brief participation in the alleged conspiracy and the fact that, on multiple days during the trial, he was never even mentioned.

The district court did not abuse its discretion in denying Leslie Mower's or James Thompson's motion to sever. Under Rule 8(b) of the Federal Rules of Criminal Procedure, a single indictment may charge multiple defendants "if they are alleged to have participated in the same act or transaction, or in the same series of acts or transactions, constituting an offense or offenses." Even if multiple defendants have been charged together in a single indictment, though, the district court may sever their trials: "If the joinder of offenses or defendants in an indictment, an information, or a consolidation for trial appears to prejudice a defendant or the government, the court may order

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separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires." Fed.R.Crim.P. 14(a). "The granting of a motion to sever is ordinarily left to the district court's discretion." *United States v. Powell*, 982 F.2d 1422, 1432 (10th Cir.1992). "Neither a mere allegation that defendant would have a better chance of acquittal in a separate

trial, nor a complaint of the `spill-over effect' from the evidence that was overwhelming or more damaging against the co-defendant than that against the moving party is sufficient to warrant severance." *United States v. Hack*, 782 F.2d 862, 870-71 (10th Cir.1986) (citations omitted). Rather, "absent a showing of clear prejudice, a joint trial of the defendants who are charged with a single conspiracy in the same indictment is favored where proof of the charge is predicated upon the same evidence and alleged acts." *Id.* at 871.

Like Thomas Mower, Leslie Mower and James Thompson were charged with conspiracy to defraud the United States, and generally, "in a conspiracy trial it is preferred that persons charged together be tried together." *United States v. Scott*, 37 F.3d 1564, 1579 (10th Cir.1994). As previously discussed, there was more than enough evidence to implicate both Leslie Mower and James Thompson in the conspiracy. They were both active participants in the conspiracy, and even if James Thompson's participation in the conspiracy was comparatively brief, he created the false loan document and assisted in concealing the Mowers' income. The evidence against each defendant — not any "spillover effect" of evidence against others — provided a sufficient and independent basis for the conviction of both Leslie Mower and James Thompson.

In addition, the district court instructed the jury that

> [e]ach defendant is entitled to have his or her case decided solely on the evidence which applies to him or her. . . . You must

> give separate and individual consideration to each charge against each defendant. The fact that you find one defendant guilty or not guilty of the crimes charged in the Indictment should not control your verdict as to whether you find the other defendant guilty or not guilty of the crimes charged in the Indictment. You must consider the evidence presented and determine whether the government has proved, beyond a reasonable doubt, its case against each of the defendants.

Jury Instruction No. 18, ROA, Vol, V, Doc. 188, at 19; *see also* Jury Instruction No. 21, *Id.* at 22. These instructions cured any potential prejudice that could have resulted from a joint trial. *See Zafiro v. United States*, 506 U.S. 534, 540-41, 113 S.Ct. 933, 122 L.Ed.2d 317 (1993) ("Moreover, even if there were some risk of prejudice, here it is of the type that can be cured with proper instructions, and juries are presumed to follow their instructions." (citation and internal quotation marks omitted)). The district court did not abuse its discretion by denying the motion for severance.

Jury instructions

Leslie Mower appeals three issues with regard to the district court's jury instructions. She argues that the district court erred in (1) refusing to give a requested instruction explaining the difference between corporate and personal income; (2) refusing to

give a requested instruction on the Mowers' theory of defense; and (3) not providing an instruction allowing the jury to consider the lesser-included offense of misdemeanor tax evasion.

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A. *Jury instruction distinguishing personal from corporate income*

The defendants proposed a jury instruction explaining the difference between personal and corporate income. At the jury instruction conference, the district court accepted most of the proposed instruction, including the following paragraphs:

> The first step in arriving at taxable income is to determine the individual taxpayers' gross income.
>
> . . .
>
> In determining whether the income is personal to the defendants, you may consider several factors, including whether the defendants actually received the money, how the money was used, the intent of the parties as determined by all of the circumstances, the economic realities, and the substance and the form of the transaction.

Jury Instruction No. 31, ROA, Vol. V, Doc. 188, at 34. The district court, however, refused to include an

additional paragraph that the defendants had proposed as part of this instruction. This paragraph stated:

> However, the fact that a defendant owns a corporation and makes decisions regarding corporate monies does not mean that the corporation's income is taxable to him or her personally because, by definition, the owner of a corporation always has control over corporate monies.

L.M. Opening Br. at 34 n. 12.[fn16] Leslie Mower's counsel, Neil Kaplan, acquiesced in this final jury instruction:

> THE COURT: We're going to replace 35 and 36 with the Mowers' proposal, with the third paragraph deleted. And then, in the second paragraph, the phrase between the comma "rather than to their corporations," that's out.
>
> MR. KAPLAN: We're fine. . . .

Jury Instruction Conference, ROA, Vol. XXV, at 28-29.

Because Leslie Mower agreed to the final language of Jury Instruction No. 31, we review for plain error. *See United States v. Robertson*, 473 F.3d 1289, 1291 (10th Cir.2007). "Plain error exists only where (1) there was error, (2) that is plain, (3) that affects substantial rights, and (4) that seriously affects the fairness, integrity or public reputation of judicial proceedings." *Id.* Here, the district court did not err in

refusing to include the defendants' proposed paragraph, so the first prong of our plain error standard disposes of Leslie Mower's argument. The language that ultimately appeared in Jury Instruction No. 31 was more than adequate to instruct the jury on the difference between corporate and personal income. The omitted language, in contrast, could have created confusion for the jury because it overemphasized the amount of control an owner of a corporation appropriately exercises over corporate monies. The omitted language also failed to account for the law regarding constructive dividends — where the amounts are ultimately taxed twice, as both corporate and shareholder income. *See, e.g., Wortham Mach. Co. v. United States*, 521 F.2d 160, 164 (10th Cir.1975). The district court appropriately refused to include this language. See *United States v. Kaatz*, 705 F.2d 1237, 1246 (10th Cir.1983) ("The instructions must be reviewed as a whole. The requested instruction would have added nothing but confusion and was properly refused." (citation omitted)).

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B. *Jury instruction regarding defendants' theory of defense*

The defendants also proposed a jury instruction regarding their theory of defense. This proposed instruction stated:

> As to Counts Two through Seven, if you have a reasonable doubt as to whether . . . Leslie D. Mower willfully failed to report

> income . . . she knew was personal income because . . . Leslie D. Mower believed:
>
> 1. the monies were income or a loan to a corporation;
>
> 2. the monies were repayment of loans;
>
> 3. that taxes on the monies had, been withheld and paid;
>
> 4. that for any other reason the monies were not taxable to [the Mowers] personally,
>
> then you must find . . . Leslie D. Mower not guilty, even if you also have some question that additional taxes may still be due.

Theory of Defense Instruction, ROA, Vol. V, Doc. 186, at 4.[fn17] The district court refused to include this instruction.

"Criminal defendants are entitled to jury instructions upon their theory of defense provided there is evidentiary and legal support. Upon the failure to so instruct, we will find reversible error." *United States v. Visinaiz*, 428 F.3d 1300, 1308 (10th Cir.2005) (citation omitted). The district court, however, is not required to give a theory of the defense instruction "if it would simply give the jury a clearer understanding of the issues." *United States v. Wolny*, 133 F.3d 758, 765 (10th Cir.1998). Rather, the district court is only

required to give the instruction "if, without the instruction, the district court's instructions were erroneous or inadequate." *Id.* "We review the instructions de novo to determine whether, as a whole, they adequately apprised the jury of the issues and the governing law." *Id.*

Here, the district court's instructions "adequately apprised the jury of the issues and the governing law" regarding willfulness, and the rejected jury instruction was unnecessary. *Id.* For instance, the district court instructed the jury that "a failure to report income on a tax return, without willfulness, is not sufficient to satisfy the requirement of an affirmative act of evasion." Jury Instruction No. 32, ROA, Vol. V, Doc. 188, at 35. Another jury instruction provided:

> The word "willfully," as used in this tax statute means a voluntary, intentional violation of a known legal duty. In other words, the defendant must have acted voluntarily and intentionally and with the specific intent to do something the law forbids; that is to say, with a purpose either to disobey or to disregard the law. . . . [N]egligent conduct, even grossly negligent conduct, a mistake, misunderstanding, and/or a good faith belief, even if unreasonable, is not sufficient to constitute willfulness.

Jury Instruction No. 33, *Id.* at 36. In light of these jury instructions, the district court was not required to give

Leslie Mower's proposed theory of the defense instruction, which was "essentially [a] summar[y] of the evidence in the light most favorable to the defense, [a] summar[y] that [was] more appropriate for closing argument." *Wolny*, 133 F.3d at 766 (citations, alteration, and internal quotation marks omitted).

C. *Lesser-included offense instruction*

Leslie Mower argues that the district court erred in not providing a lesser-included

offense instruction for misdemeanor tax evasion.[fn18] She admits that she did not request this instruction before the district court. Therefore, as we have explained in a previous case, she may not be entitled to any appellate review — even for plain error: "'[T]his court has often held in noncapital cases involving direct appeals that a trial court does not err in refusing to give a lesser included instruction — even one supported by the evidence — if the defendant neglects to make a proper request for one at trial.'" *United States v. Bruce*, 458 F.3d 1157, 1164 n. 3 (10th Cir.2006) (quoting *Hooks v. Ward*, 184 F.3d 1206, 1234-35 (10th Cir.1999)). Nevertheless, in *Bruce*, 458 F.3d at 1164 & n. 3, we noted that we had "occasionally applied plain error review in contexts similar to that at issue in this case," and, given the facts in that case, we did not "definitively decide the issue because Bruce's claim fails even assuming plain error review is applicable when a defendant fails to make a proper request for a lesser-included-offense instruction."

Likewise, even if we review Leslie Mower's claim under our plain error standard, it fails. Like the court in *Bruce*, 458 F.3d at 1164-66, we need only address the fourth prong of the plain error test, because Leslie Mower has not shown any error "that seriously affects the fairness, integrity or public reputation of judicial proceedings." "Under this standard, *we will not notice a non-constitutional error, such as the one in the case before us, unless it is both particularly egregious and our failure to notice the error would result in a miscarriage of justice.'" *Id.* at 1165 (quoting *United States v. Gonzalez-Huerta*, 403 F.3d 727, 736 (10th Cir.2005) (en banc)). Leslie Mower has the burden of meeting this standard. *Id.* As discussed previously, there was more than enough evidence to support Leslie Mower's conviction of tax evasion under 26 U.S.C. § 7201, and Leslie Mower has not shown that a "miscarriage of justice" resulted from the district court's failure to instruct on the lesser-included offense of misdemeanor tax evasion. *Accord Bruce*, 458 F.3d at 1165 ("Despite Bruce's protestations to the contrary, the government's case against him was strong.").

Leslie Mower's sentencing

Leslie Mower appeals several issues with regard to her sentencing. She argues that (1) her sentence was procedurally unreasonable because the district court incorrectly calculated her tax loss and applied the Guidelines as mandatory; (2) her sentence was substantively unreasonable under the factors listed in 18 U.S.C. § 3553(a); and (3) the application of the 2005 Guidelines violated the *ex post facto* clause of the Constitution.

"When reviewing a sentencing challenge, we evaluate sentences imposed by the district court for reasonableness." *United States v. Conlan*, 500 F.3d 1167, 1169 (10th Cir.2007) (citing *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005); *United States v. Kristl*, 437 F.3d 1050, 1053 (10th Cir.2006)); *see also Gall v. United States*, ___ U.S. ___, 128 S.Ct. 586, 594, 169 L.Ed.2d 445 (2007) ("[A]ppellate review of sentencing decisions is limited to determining whether they are `reasonable.'"). This inquiry includes both procedural and substantive components, and we "review the sentence under an abuse-of-discretion standard." *Gall*, 128 S.Ct. at 597. "Procedural reasonableness involves using the proper method to calculate the sentence. Substantive reasonableness involves

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whether the length of the sentence is reasonable given all the circumstances of the case in light of the factors set forth in 18 U.S.C. § 3553(a)." *Conlan*, 500 F.3d at 1169 (citations omitted).

A. *Procedural reasonableness*

1. *Tax loss calculation*

Leslie Mower challenges the procedural reasonableness of the district court's tax loss findings. First, she argues that the district court erred in failing to apportion its tax loss findings by year. It does not appear that she raised this issue before the district court, so we review for plain error. See *Robertson*, 473

F.3d at 1291.

The district court did not err in failing to apportion its tax loss findings by year, and Leslie Mower's claim fails under the first prong of our plain error test. *See Id.* Under the Guidelines, the district court was required to determine Leslie Mower's base offense level by calculating her tax loss and comparing it to the tax loss table in U.S.S.G. § 2T4.1. *See* U.S.S.G. § 2T1.1(a)(1). For an offense involving tax evasion, "the tax loss is the total amount of loss that was the object of the offense (*i.e.*, the loss that would have resulted had the offense been successfully completed)." *Id.* § 2T1.1(c)(1). In addition, where "a defendant [was] convicted of more than one count," and the "counts involv[ed] substantially the same harm," the district court is required to group the counts together and determine "the offense level corresponding to the aggregated quantity." *Id.* §§ 3D1.1(a)(1), 3D1.2(d) (citing § 2T1.1), 3D1.3(b). The district court, therefore, appropriately grouped the counts against Leslie Mower and calculated her offense level based upon "the aggregated quantity" of the tax loss. *Id.* § 3D1.3(b).

There is also no support for Leslie Mower's argument that, because Thomas Mower was convicted of tax evasion for the same amounts, the district court was required to reduce her tax loss by fifty percent in calculating her base offense level. Section 1B1.3(a)(1) of the Guidelines explains that

> the base level offense . . . shall be determined on the basis of the following:
>
> . . .

> (B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity,
>
> that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense[.]

See also United States v. Bishop, 291 F.3d 1100, 1115 (9th Cir.2002) ("Because the defendants were convicted of conspiring to defraud the IRS, the total tax loss, including the loss through the spouses, is attributable to each defendant. Tax loss is determined from the reasonably foreseeable conduct of all co-actors, not just the defendant's own conduct." (citation omitted)). Given this standard, it is far more likely that the district court erred in not including the Hobble Creek transaction, or all of the money from the Rezults account, in Leslie Mower's tax loss calculations than it is that the district court erred in not reducing her tax loss by fifty percent.

The district court did commit one procedural error, but it was harmless. In its tax loss findings, the district court stated that it was applying the 2005 Guidelines. At sentencing, though, the district court

actually applied the 2001 Guidelines.

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As will be discussed, the district court was correct in applying the 2001 Guidelines. Under the "one-book rule" of the Guidelines, however, the district court erred in using sections from two different versions of the Guidelines. See U.S.S.G. § 1B1.11(b)(2). Nevertheless, the provision that the district court cites in its tax loss findings — the tax loss table in U.S.S.G. § 2T4.1 — is the same in the 2001 Guidelines as it is in the 2005 Guidelines for calculating Leslie's Mower's base offense level. *Compare* U.S.S.G. § 2T4.1 (2005), *with* U.S.S.G. § 2T4.1 (2001). In addition, the sentencing table in both sets of Guidelines is the same with regard to Leslie Mower, who had a total offense level of 18 and a criminal history category of I. *Compare* U.S.S.G. ch. 5, pt. A (2005), *with* U.S.S.G. ch. 5, pt. A (2001). Any error was harmless.

2. *Application of the Guidelines*

Leslie Mower argues that the district court violated *Booker* by applying the Guidelines in a mandatory fashion, and therefore, her sentence was procedurally unreasonable. Under the Supreme Court's decision in *Booker*, 543 U.S. at 226-27, 245, 125 S.Ct. 738, the Guidelines are advisory, and the district court may not apply them in a mandatory fashion. Because Leslie Mower did not object to this alleged sentencing error before the district court, we review for plain error. See *United States v. Begay*, 470 F.3d 964, 976 (10th Cir.2006); *see also Booker*, 543 U.S. at 268, 125

S.Ct. 738 ("[W]e expect reviewing courts to apply ordinary prudential doctrines, determining, for example, whether the issue was raised below and whether it fails the `plain-error' test.").

The district court did not apply the Guidelines in a mandatory fashion, and Leslie Mower's claim fails under the first prong of our plain error test. Leslie Mower relies on two statements by the district court as evidence that it applied the Guidelines in a mandatory fashion. The first is the district court's statement at sentencing, in response to her contention that her disabled son needed her at home:

> I am troubled by the relationship matter, but the law is so-presumptions are so much against family problems to be taken into consideration. You know, about one case out of three has something like this, and the law has just developed steadily presumptively against it and the presumption is that somehow arrangements can be made. So as I said a minute ago, the 3553 factors lead me still to a low end guideline sentence here without leading role applying.

L.M. Sentencing, ROA, Vol. XXIX, Doc. 350, at 23. This statement does not show that the district court viewed the Guidelines as mandatory. Rather, the district court is simply acknowledging that defendants often cite their family responsibilities as a reason for imposing lighter sentences, and the law generally discourages district courts from taking this into account. See

United States v. Hildreth, 485 F.3d 1120, 1129 (10th Cir.2007) ("[I]ndeed, as a matter of policy, the Guidelines discourage courts from considering family ties and responsibilities in sentencing decisions." (citing U.S.S.G. § 5H1.6)).

The second statement came in response to Leslie Mower's request on February 26, 2007, that the district court "recommend to the Bureau of Prisons that she be placed in a Community Correctional Facility pursuant to the factors set forth in 18 U.S.C. § 3621(b)." Doc. 354, at 2 (citing *Wedelstedt v. Wiley*, 477 F.3d 1160 (10th Cir.2007)). The district court responded with the following:

> Defendant's current back problems have arisen since sentencing. Although the

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> court will not affirmatively recommend placement in a community correctional center, the court would not oppose [her] placement in a community correctional center. Her current health problems and the fact that such a placement would afford her increased access to her treating physicians certainly weigh in favor of such a placement. She also poses no threat to the community.

02/28/07 Order, Doc. 360, at 2. This statement does not show that the district court viewed the Guidelines as mandatory. Indeed, this statement came months after

sentencing, and even then, the district court did not indicate that it felt in any way constrained by the Guidelines. *See Id.* Instead, the district court appropriately examined her circumstances and decided not to "recommend placement in a community correctional facility." *Id.*

In addition, the district court explained at sentencing that it had applied the sentencing factors under 18 U.S.C. § 3553(a). See L.M. Sentencing, ROA, Vol. XXIX, Doc. 350, at 23 ("[T]he 3553 factors lead me still to a low end guideline sentence here. . . ."). Given this explanation, and the lack of any evidence that the district court viewed the Guidelines as mandatory, Leslie Mower's sentence was procedurally reasonable.[fn19]

B. *Substantive reasonableness*

As the Supreme Court recently explained in *Kimbrough v. United States*, ___ U.S. ___, 128 S.Ct. 558, 564, 169 L.Ed.2d 481 (2007), "'reasonableness' is the standard controlling appellate review of the sentences district courts impose." We review for substantive reasonableness "under an abuse-of-discretion standard," and, "[w]hen conducting this review, [we] will, of course, take into account the totality of the circumstances, including the extent of any variance from the Guidelines range." *Gall*, 128 S.Ct. at 597. Moreover, we may apply a presumption of reasonableness to a sentence properly calculated under the Guidelines. *Id.* "'The defendant may rebut this presumption by demonstrating that the sentence is unreasonable in light of the other sentencing factors

laid out in [18 U.S.C] § 3553(a).'" *United States v. Arrevalo-Olvera*, 495 F.3d 1211, 1213 (10th Cir.2007) (quoting *Kristl*, 437 F.3d at 1055) (alteration in original).

Under the district court's tax loss findings, Leslie Mower's sentence was within the Guidelines range, and we accord it a presumption of reasonableness. *Id.* Leslie Mower has failed to demonstrate that the sentence is unreasonable in light of the factors listed in 18 U.S.C. § 3553(a). We therefore hold that the district court did not abuse its discretion, and we affirm her sentence as substantively reasonable.

C. *Leslie Mower's sentence under the ex post facto clause*

Leslie Mower argues that the district court violated the *ex post facto* clause, U.S. Const., art. I, § 9, cl. 3, by sentencing her under the 2005 Guidelines, rather than the 1989 Guidelines. She concedes that she did not object to the district court on this ground, so our review is only for plain error.

The district court did not err here, arid, as a result, Leslie Mower's *ex post facto* claim fails under the first prong of our plain error test. *See Robertson*, 473 F.3d at 1291. "A sentencing court is generally

required to apply the Guidelines that are in effect on the date the defendant is sentenced." *United States v.*

Gerber, 24 F.3d 93, 95 (10th Cir.1994); *see also* 18 U.S.C. § 3553(a)(4)(A)(ii); U.S.S.G. § 1B1.11(a). However, the *ex post facto* clause "bars the sentencing court from retroactively applying an amended guideline provision when that amendment disadvantages the defendant." *Gerber*, 24 F.3d at 95-96 (citation and internal quotation marks omitted). To determine whether the application of a version of the Guidelines violates the *ex post facto* clause, we use a two-prong test: "first, did the sentencing court apply the guideline to events occurring before its enactment, and second, did that guideline disadvantage the offender affected by it." *Id.* at 96 (citations and internal quotation marks omitted).

In the instant case, the district court correctly applied the 2001 version of the Guidelines in sentencing Leslie Mower.[fn20] The district court explained:

> I think the evidence is that there were overt acts after 2001. I don't think that's inconsistent with the loss findings. So I'm going to apply the 2001 guidelines.

T.M. Sentencing, ROA, Vol. XXIX, Doc. 325, at 18; *see also* L.M. Sentencing, ROA, Vol. XXIX, Doc. 350, at 7 (same rationale applies). The district court was correct that the evidence showed overt acts (for conspiracy) and affirmative acts of evasion (for the six counts of tax evasion) that occurred after 2001. Given that all of her offenses continued after the date on which the 2001 Guidelines became effective, the district court did not violate the *ex post facto* clause by applying the 2001

Guidelines at her sentencing. *See United States v. Sullivan*, 255 F.3d 1256, 1259 (10th Cir.2001) ("Because the defendant completed the second offense after the amendment to the guidelines took effect, the *ex post facto* clause does not prevent determining the sentence for that count based on the amended guidelines." (quoting U.S.S.G. § 1B1.11 cmt. background)); *cf.* U.S.S.G. § 1B1.11(b)(1) (explaining that, if the *ex post facto* clause would otherwise be violated, "the court shall use the Guidelines Manual in effect on the date that the offense of conviction was committed").

III.

The convictions and sentences of Thomas Mower, Leslie Mower, and James Thompson are AFFIRMED.

[fn1] Neways U.S. is located in Utah and was originally named "Images & Attitudes."

[fn2] The corporation's bylaws did not actually provide for a position called "Chief Financial Officer," but she referred to herself as such.

[fn3] Individually, these were: Images, Inc. 1; Images, Inc. 2; Images, Inc. 3; Images, Inc. 4; Images, Inc. 5; Images, Inc. 6; and Images, Inc. 7. When their names later changed to Neways, and then to Mower Properties, they stayed as seven separate entities. We will largely refer to these entities collectively, as "Neways 1 through 7."

[fn4] The check registers listed the identification numbers in the column reserved for each payee's Social Security number. For example, both Neways, Inc. 1 and Mower Properties, Inc. 1 had the identification number 000-00-0101 on the check registers.

[fn5] Brett Mower is the Mowers' son.

[fn6] Mr. Simpson also sold a contiguous piece of property to other members of the Mower family. This property has a barn with a "Neways" sign on it, and a pavilion was built on this property for entertaining. Mr. Simpson did not know who presently owned the property.

[fn7] Allen Davis testified that Thomas Mower viewed the Hobble Creek monies as a loan from Neways Australia, whereas Mr. Cunningham's testimony, Mr. Dwyer's fax, and Ms. Lane's testimony stated that Thomas Mower viewed other monies as repayment for a loan from Thomas Mower to Neways Australia. This distinction probably results because Mr. Cunningham, Mr. Dwyer, and Ms. Lane were mostly testifying about the monies wired to the Mower Properties account — not the Hobble Creek monies — but it is not entirely clear from the testimony.

[fn8] Mr. Cunningham and Allen Davis testified that, in referring to the "Mowers," John Dwyer's response may have been referring to the companies themselves, because people in the Neways companies. often failed to distinguish between the companies and the Mowers personally. Mr. Cunningham further testified that his testimony was consistent with Neways U.S. owning the

Neways 1 through 7 distributorships.

[fn9] The total commissions were $3,775,764, from which she subtracted reported commission income of $565,949.

[fn10] During a previous audit in 1993, the IRS had discovered something similar: a bank account that was not included on Images & Attitudes' tax returns, that had a different identification number than Images & Attitudes'. The account was in the name of "Images International, Inc." and was located in Van Alstyne, Texas.

[fn11] Ordinarily, the doctrine of constructive receipt applies to prevent taxpayers from shifting income into subsequent tax years (e.g., to obtain a more favorable marginal tax rate). Assuming the commission checks were personal income to the Mowers, though, there is no reason for us to refrain from applying this doctrine here.

[fn12] Both Leslie Mower and James Thompson raised this issue before the district court. Thomas Mower raised this issue below, but he does not raise it on appeal.

[fn13] Leslie Mower also argues that tax evasion is not a "continuing offense" for statute of limitations purposes. Given that the affirmative acts of evasion are part of the crime itself, and the statute of limitations does not begin running until the affirmative acts are complete, *see Anderson*, 319 F.3d at 1220-21, the "continuing offense" doctrine is irrelevant here. *See*

United States v. Eklund, 551 F.Supp. 964, 969 (D.Iowa 1982). There is also no reason to distinguish between evasion of assessment and evasion of payment cases for statute of limitations purposes. *See United States v. Hunerlach*, 197 F.3d 1059, 1065 (11th Cir.1999). In addition, as previously discussed, the jury's finding that she committed the affirmative act within the statute of limitations is not negated by the district court's tax loss findings. Further, because Leslie Mower's statute of limitations theory is wrong as a matter of law, she certainly was not entitled to a jury instruction incorporating that theory. Finally, contrary to her contention, there was unreported commission income in 1992.

[fn14] Thus, Thomas Mower is incorrect in claiming that the government's conduct, pre-indictment, violated his Sixth Amendment right to counsel. *Kingston*, 971 F.2d at 491 ("Because the Sixth Amendment right to counsel does not attach prior to indictment, Appellant cannot show that he was prejudiced by a Sixth Amendment violation on these facts." (citation omitted)).

[fn15] The disclosure of the draft amended individual income tax returns appears to be the only "damaging disclosure" that Thomas Mower alleges here. Perhaps the language of his brief can be interpreted as contending that other "disclosures" by Mr. Davis on December 5, 2002, were prejudicial, *see* T.M. Opening Br. at 43 ("*Among* the more damaging disclosures. . . ." (emphasis added)), but without any additional specificity, it would be difficult — if not impossible — for us to determine whether any "actual and

substantial prejudice" resulted from these "damaging disclosures."

[fn16] Although the text of the supposed instruction is not in the record on appeal, the parties appear to agree on its content.

[fn17] Again, Leslie Mower cites to an exhibit to Doc. 187, which is not in the record. The government, however, cites to Doc. 186, which is in the record and appears to include the exact same language.

[fn18] She never actually specifies which crime she is referencing, but presumably it is 26 U.S.C. § 7203. The government assumes as much in its brief.

[fn19] In a separate section of her brief on appeal, Leslie Mower argues that the district court violated *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). This appears to be a restatement of her argument that the district court applied the Guidelines in a mandatory fashion.

[fn20] As discussed above, the district court did err in applying the 2005 Guidelines in calculating Leslie Mower's tax loss, but because the 2005 Guidelines were the same as the 2001 Guidelines in this regard, such error was harmless. For similar reasons, this did not "disadvantage" Leslie Mower for the purposes of our *ex post facto* clause analysis.

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APPENDIX 2:

26 U.S.C. § 441 (2007). Period for Computation of Taxable Income.

(a) Computation of taxable income

Taxable income shall be computed on the basis of the taxpayer's taxable year.

(b) Taxable year

For purposes of this subtitle, the term "taxable year" means —

(1) the taxpayer's annual accounting period, if it is a calendar year or a fiscal year;

(2) the calendar year, if subsection (g) applies;

(3) the period for which the return is made, if a return is made for a period of less than 12 months; or

(4) in the case of a DISC filing a return for a period of at least 12 months, the period determined under subsection (h).

(c) Annual accounting period For purposes of this subtitle, the term "annual accounting period" means the annual period on the basis of which the taxpayer regularly computes his income in keeping his books.

(d) Calendar year For purposes of this subtitle, the

term "calendar year" means a period of 12 months ending on December 31.

(e) Fiscal year For purposes of this subtitle, the term "fiscal year" means a period of 12 months ending on the last day of any month other than December. In the case of any taxpayer who has made the election provided by subsection (f) the term means the annual period (varying from 52 to 53 weeks) so elected.

(f) Election of year consisting of 52-53 weeks

(1) General rule A taxpayer who, in keeping his books, regularly computes his income on the basis of an annual period which varies from 52 to 53 weeks and ends always on the same day of the week and ends always —

(A) on whatever date such same day of the week last occurs in a calendar month, or

(B) on whatever date such same day of the week falls which is nearest to the last day of a calendar month, may (in accordance with the regulations prescribed under paragraph (3)) elect to compute his taxable income for purposes of this subtitle on the basis of such annual period. This paragraph shall apply to taxable years ending after the date of the enactment of this title.

(2) Special rules for 52-53-week year

(A) Effective dates In any case in which the effective date or the applicability of any provision of this title is expressed in terms of taxable years beginning, including, or ending with reference to a specified date which is the first or last day of a month, a taxable year described in paragraph (1) shall (except for purposes of the computation under section 15) be treated —

(i) as beginning with the first day of the calendar month beginning nearest to the first day of such taxable year, or

(ii) as ending with the last day of the calendar month ending nearest to the last day of such taxable year, as the case may be.

(B) Change in accounting period In the case of a change from or to a taxable year described in paragraph (1) —

(i) if such change results in a short period (within the meaning of section 443) of 359 days or more, or of less than 7 days, section 443(b) (relating to alternative tax computation) shall not apply;

(ii) if such change results in a short period of less than 7 days,

such short period shall, for purposes of this subtitle, be added to and deemed a part of the following taxable year; and

(iii) if such change results in a short period to which subsection (b) of section 443 applies, the taxable income for such short period shall be placed on an annual basis for purposes of such subsection by multiplying the gross income for such short period (minus the deductions allowed by this chapter for the short period, but only the adjusted amount of the deductions for personal exemptions as described in section 443(c)) by 365, by dividing the result by the number of days in the short period, and the tax shall be the same part of the tax computed on the annual basis as the number of days in the short period is of 365 days.

(3) Special rule for partnerships, S corporations, and personal service corporations

The Secretary may by regulation provide terms and conditions for the application of this subsection to a partnership, S corporation, or personal service corporation (within the meaning of section 441(i)(2)).

(4) Regulations

The Secretary shall prescribe such regulations as he deems necessary for the application of this subsection.

(g) No books kept; no accounting period

Except as provided in section 443 (relating to returns for periods of less than 12 months), the taxpayer's taxable year shall be the calendar year if —

(1) the taxpayer keeps no books;

(2) the taxpayer does not have an annual accounting period; or

(3) the taxpayer has an annual accounting period, but such period does not qualify as a fiscal year.

(h) Taxable year of DISC's

(1) In general

For purposes of this subtitle, the taxable year of any DISC shall be the taxable year of that shareholder (or group of shareholders with the same 12-month taxable year) who has the highest percentage of voting power.

(2) Special rule where more than one shareholder (or group) has highest percentage

If 2 or more shareholders (or groups) have the highest percentage of voting power under paragraph (1), the taxable year of the DISC shall be the same 12-month period as that of any such shareholder (or group).

(3) Subsequent changes of ownership

The Secretary shall prescribe regulations under which paragraphs (1) and (2) shall apply to a change of ownership of a corporation after the taxable year of the corporation has been determined under paragraph (1) or (2) only if such change is a substantial change of ownership.

(4) Voting power determined

For purposes of this subsection, voting power shall be determined on the basis of total combined voting power of all classes of stock of the corporation entitled to vote.

(i) Taxable year of personal service corporations

(1) In general

For purposes of this subtitle, the taxable year of any personal service corporation shall be the calendar year unless the corporation establishes, to the satisfaction of the Secretary, a business purpose for having a different period for its taxable year. For purposes of this paragraph, any deferral of income to shareholders shall not be treated as a business purpose.

(2) Personal service corporation

For purposes of this subsection, the term "personal service corporation" has the meaning given such term by section 269A(b)(1), except that section 269A(b)(2) shall be applied —

(A) by substituting "any" for "more than 10 percent", and

(B) by substituting "any" for "50 percent or more in value" in section 318(a)(2)(C).

A corporation shall not be treated as a personal service corporation unless more than 10 percent of the stock (by value) in such corporation is held by employee-owners (within the meaning of section 269A(b)(2), as modified by the preceding sentence). If a corporation is a member of an affiliated group filing a consolidated return, all members of such group shall be taken into account in determining whether such corporation is a personal service corporation.

APPENDIX 3:

26 U.S.C. § 6531. Periods of Limitation on Criminal Prosecutions.

No person shall be prosecuted, tried, or punished for any of the various offenses arising under the internal revenue laws unless the indictment is found or the information instituted within 3 years next after the commission of the offense, except that the period of limitation shall be 6 years —

(1) for offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner;

(2) for the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof;

(3) for the offense of willfully aiding or assisting in, or procuring, counseling, or advising, the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a false or fraudulent return, affidavit, claim, or document (whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document);

(4) for the offense of willfully failing to pay any tax, or make any return (other than a return required under authority of part III of subchapter A of chapter

61) at the time or times required by law or regulations;

(5) for offenses described in sections 7206(1) and 7207 (relating to false statements and fraudulent documents);

(6) for the offense described in section 7212(a) (relating to intimidation of officers and employees of the United States);

(7) for offenses described in section 7214(a) committed by officers and employees of the United States; and

(8) for offenses arising under section 371 of Title 18 of the United States Code, where the object of the conspiracy is to attempt in any manner to evade or defeat any tax or the payment thereof.

The time during which the person committing any of the various offenses arising under the internal revenue laws is outside the United States or is a fugitive from justice within the meaning of section 3290 of Title 18 of the United States Code, shall not be taken as any part of the time limited by law for the commencement of such proceedings. (The preceding sentence shall also be deemed an amendment to section 3748(a) of the Internal Revenue Code of 1939, and shall apply in lieu of the sentence in section 3748(a) which relates to the time during which a person committing an offense is absent from the district wherein the same is committed, except that such amendment shall apply only if the period of limitations under section 3748 would, without the

application of such amendment, expire more than 3 years after the date of enactment of this title, and except that such period shall not, with the application of this amendment, expire prior to the date which is 3 years after the date of enactment of this title.) Where a complaint is instituted before a commissioner of the United States within the period above limited, the time shall be extended until the date which is 9 months after the date of the making of the complaint before the commissioner of the United States. For the purpose of determining the periods of limitation on criminal prosecutions, the rules of section 6513 shall be applicable.

Appendix 4:

26 U.S.C. § 7203 (1990). Willful Failure to File Return, Supply Information, or Pay Tax.

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return, keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $25,000 ($100,000 in the case of a corporation), or imprisoned not more than 1 year, or both, together with the costs of prosecution. In the case of any person with respect to whom there is a failure to pay any estimated tax, this section shall not apply to such person with respect to such failure if there is no addition to tax under section 6654 or 6655 with respect to such failure. In the case of a willful violation of any provision of section 6050I, the first sentence of this section shall be applied by substituting "felony" for "misdemeanor" and "5 years" for "1 year".

Appendix 5:

U.S. Sentencing Guidelines Manual § 1B1.1. Application Instructions.

Except as specifically directed, the provisions of this manual are to be applied in the following order:

(a) Determine, pursuant to § 1B1.2 (Applicable Guidelines), the offense guideline section from Chapter Two (Offense Conduct) applicable to the offense of conviction. See § 1B1.2.

(b) Determine the base offense level and apply any appropriate specific offense characteristics, cross references, and special instructions contained in the particular guideline in Chapter Two in the order listed.

(c) Apply the adjustments as appropriate related to victim, role, and obstruction of justice from Parts A, B, and C of Chapter Three.

(d) If there are multiple counts of conviction, repeat steps (a) through (c) for each count. Apply Part D of Chapter Three to group the various counts and adjust the offense level accordingly.

(e) Apply the adjustment as appropriate for the defendant's acceptance of responsibility from Part E of Chapter Three.

(f) Determine the defendant's criminal history category as specified in Part A of Chapter Four. Determine from Part B of Chapter Four any other

applicable adjustments.

(g) Determine the guideline range in Part A of Chapter Five that corresponds to the offense level and criminal history category determined above.

(h) For the particular guideline range, determine from Parts B through G of Chapter Five the sentencing requirements and options related to probation, imprisonment, supervision conditions, fines, and restitution.

(i) Refer to Parts H and K of Chapter Five, Specific Offender Characteristics and Departures, and to any other policy statements or commentary in the guidelines that might warrant consideration in imposing sentence.

Appendix 6:

U.S. Sentencing Guidelines Manual § 1B1.11. Use of Guidelines Manual in Effect on Date of Sentencing (Policy Statement).

(a) The court shall use the Guidelines Manual in effect on the date that the defendant is sentenced.

(b) (1) If the court determines that use of the Guidelines Manual in effect on the date that the defendant is sentenced would violate the ex post facto clause of the United States Constitution, the court shall use the Guidelines Manual in effect on the date that the offense of conviction was committed.

(2) The Guidelines Manual in effect on a particular date shall be applied in its entirety. The court shall not apply, for example, one guideline section from one edition of the Guidelines Manual and another guideline section from a different edition of the Guidelines Manual. However, if a court applies an earlier edition of the Guidelines Manual, the court shall consider subsequent amendments, to the extent that such amendments are clarifying rather than substantive changes.

(3) If the defendant is convicted of two offenses, the first committed before, and the second after, a revised edition of the Guidelines Manual became effective, the revised edition of the Guidelines Manual is to be applied to both offenses.

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SEP 23 2008

No. 07-1539

In the Supreme Court of the United States

LESLIE D. MOWER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court's use of the 2001 Sentencing Guidelines violated the Ex Post Facto Clause, U.S. Const. Art. I, § 9, Cl. 3, when affirmative acts in furtherance of each offense were committed after 2001.

2. Whether the district court abused its discretion in admitting the government's summary charts.

3. Whether the district court erred in holding that the statute of limitations for petitioner's tax evasion offenses began to run after the last affirmative act of evasion.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-82) is reported at 518 F.3d 832.

JURISDICTION

The judgment of the court of appeals was entered on March 12, 2008. The petition for a writ of certiorari was filed on June 7, 2008. The jurisdiction of this Court is invoked under 28 U.S C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Utah, petitioner was convicted of one count of conspiracy to defraud the United States, in violation of 18 U.S.C. 371, and six counts of tax evasion, in violation of 26 U.S.C. 7201, for the tax years 1992 through 1997. The district court sentenced peti-

tioner to 27 months of imprisonment, to be followed by three years of supervised release. The court of appeals affirmed. Pet. App. 1-82.

1. Petitioner and her husband, Thomas Mower, owned corporations in the United States (Neways US), Australia (Neways Australia), and Malaysia (Neways Malaysia) that used a multilevel marketing system to sell personal care products. Pet. App. 4. The corporations sold their products to distributors, who then recruited other distributors to sell the products to the public. *Id.* at 4-5. Petitioner primarily dealt with the corporations' distributors, although she also made decisions "on a daily basis for Neways US" and served as Chief Financial Officer of Neways US during the mid-1990s. *Id.* at 5. The Mowers created a number of entities as a way to transfer income from the corporations to bank accounts they controlled; those entities never filed corporate tax returns and never paid federal taxes. *Id.* at 7-9, 23-24. All three corporations regularly issued commission checks to those entities, and the commission checks were ultimately deposited into accounts controlled by petitioner and her husband. *Id.* at 6-9. Petitioner and her husband used some of the proceeds from commission checks to purchase a $650,000 property, called Hobble Creek, in 1993 or 1994. *Id.* at 10-11.

In 1997, an IRS agent began investigating the Mowers' finances. Pet. App. 12. In order to conceal the fact that the Mowers had used unreported commission income to purchase the Hobble Creek property, James Thompson, Neways US's attorney, created a backdated loan document that purported to show that the $650,000 had been a loan from Neways Australia. *Id.* at 13. Petitioner's husband, who signed the loan document, provided it to the IRS as proof of the loan. *Id.* at 13-14.

Neither petitioner's husband nor petitioner (who knew about the loan document and was kept apprised of the situation), however, ever informed the agent that the document had been created after the fact and backdated. *Id.* at 14. The IRS agent traveled to Australia to investigate the payments from Neways Australia to the Mowers; he found no evidence that a loan had been made. *Ibid.* An attorney for Neways US told the agent that Neways Australia had not properly documented the loan and that Neways US planned to file amended corporate tax returns to reflect the funds received. *Ibid.*

When an accountant from Neways US learned that the funds received were not a loan, she thought that the Mowers should amend their individual income tax returns to show the commission checks as an additional $876,324 in income to the Mowers. Pet. App. 19. An outside accounting firm ultimately prepared amended individual returns, showing that the Mowers owed over $300,000 in taxes, penalties, and interest for the 1994, 1995, and 1996 tax years. *Ibid.* Petitioner and her husband never filed the amended individual returns. *Id.* at 20. Instead, in 1998, they filed amended corporate returns showing approximately $500,000 in additional corporate income for the 1994 and 1995 tax years. *Ibid.* Petitioner also filed another amended corporate return on January 11, 2002. Gov't C.A. Br. 70.

2. On December 19, 2002, petitioner and her husband were indicted on one count of conspiracy to defraud the United States, in violation of 18 U.S.C. 371, and six counts of tax evasion, in violation of 26 U.S.C. 7201. Pet. App. 4.[1]

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[1] On April 8, 2003, a superseding indictment added James Thompson as a third co-defendant and charged him with conspiracy to defraud the

Before trial, petitioner argued that four of the tax evasion counts—for tax years 1992, 1993, 1994, and 1995—were barred by the six-year statute of limitations. Pet. App. 43-44. The district court rejected that argument, determining that petitioner had continued her evasive conduct into 1998 and that the statute of limitations did not begin to run until the date of the last evasive act. *Id.* at 44-45.

During trial, petitioner objected to the government's presentation of summary charts that reflected petitioner's and her husband's actual income and expenses based on the evidence admitted at trial. Pet. App. 48-50. The district court admitted the summary charts, but instructed the jury that the charts themselves were not evidence and that the jury could disregard the charts if it found them to be inaccurate. *Id.* at 51.

On March 18, 2005, following a 10-day jury trial, petitioner was convicted on all counts. Pet. App. 27; Gov't C.A. Br. 3.

3. At sentencing, the district court found that overt acts were committed after 2001. Pet. App. 28. Accordingly, the court used the 2001 version of the Sentencing Guidelines to calculate the advisory Guidelines range. *Ibid.* Petitioner did not argue at sentencing that the use of the 2001 Guidelines violated ex post facto principles. *Id.* at 76. The court sentenced petitioner to 27 months of imprisonment, which was the minimum of the advisory Guidelines range. *Id.* at 28.

United States, in violation of 18 U.S.C. 371, and corruptly endeavoring to interfere with the administration of the internal revenue laws, in violation of 26 U.S.C. 7212(a). Pet. App. 4. Thompson filed a petition for a writ of certiorari on June 5, 2008 (No. 07-11311), and the government waived its right to respond.

4. The court of appeals affirmed. Pet. App. 1-82.

The court of appeals rejected petitioner's argument that the statute of limitations barred four of the tax evasion counts. Pet. App. 44-47. It agreed with the district court that the statute of limitations did not begin to run until petitioner had completed the last affirmative act of evasion. *Id.* at 44. Because petitioner filed a false amended corporate return on January 6, 1998, and because that constituted an act of evasion occurring within six years of the indictment, the court held that all the tax evasion counts fell within the statute of limitations. *Id.* at 45-46.

The court of appeals also rejected petitioner's contention that the district court abused its discretion in admitting the summary charts. Pet. App. 49. The court noted that the government's evidence was "incredibly voluminous;" that each item listed in the summaries corresponded to at least one piece of evidence; that petitioner thoroughly cross-examined the IRS agent who presented the summaries; and that the district court gave an instruction cautioning the jury that the charts were not evidence and that the jury could disregard them. *Id.* at 50-51.

Finally, applying plain-error review, the court of appeals held that the district court's use of the 2001 Guidelines did not violate the Ex Post Facto Clause. Pet. App. 77-78. It agreed with the district court that "the evidence showed overt acts (for conspiracy) and affirmative acts of evasion (for the six counts of tax evasion) that occurred after 2001." *Id.* at 77. Given that all the offenses continued after the date on which the 2001 Guide-

lines became effective, the court reasoned, there was no ex post facto violation. *Id.* at 77-78.[2]

ARGUMENT

1. Petitioner first asserts (Pet. 14-26) that the district court's use of the 2001 Guidelines violated the Ex Post Facto Clause and that the court of appeals' decision to the contrary conflicts with decisions of the Third and Ninth Circuits. The court of appeals' decision is correct and does not conflict with any decision of this Court or of another court of appeals. In any event, petitioner's approach would not alter her ultimate sentence. Accordingly, further review is not warranted.

a. The Ex Post Facto Clause, U.S. Const. Art. I, § 9, Cl. 3, "bars application of a law 'that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed.'" *Johnson* v. *United States*, 529 U.S. 694, 699 (2000) (quoting *Calder* v. *Bull*, 3 U.S. 386, 390 (1798)). In *Miller* v. *Florida*, 482 U.S. 423 (1987), this Court interpreted the Ex Post Facto Clause to bar the retroactive application of a revised version of state sentencing guidelines that increased a defendant's presumptive sentencing range. When the federal Sentencing Guidelines were considered mandatory, the courts of appeals uniformly had applied this Court's holding in *Miller* to the Guidelines. See, *e.g.*, *United States* v. *Seacott*, 15 F.3d 1380, 1386 (7th Cir. 1994) ("We thus join all of our sister circuits in holding that a guideline amendment which occurs after

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[2] The court of appeals also rejected petitioner's claims (not raised here) that the evidence was insufficient to convict her of all counts, that the district court erred in not giving certain jury instructions, that the district court erred in denying her motion for severance, and that her sentence was unreasonable. Pet. App. 3-4.

the commission of the defendant's crime which works to the defendant's detriment is inapplicable because it is a violation of the Ex Post Facto Clause.").

In *United States* v. *Booker*, 543 U.S. 220 (2005), this Court invalidated mandatory Guidelines and rendered the Guidelines effectively advisory. In the wake of *Booker*, the government articulated the view that the Guidelines continued to play a pivotal role in constraining district-court sentencing discretion and in channeling appellate review. Reasoning from that premise, the government took the position that the Ex Post Facto Clause applied to advisory Guidelines. Several courts of appeals have expressed, with little analysis, the view that the Ex Post Facto Clause continues to apply to advisory Guidelines. See *United States* v. *Kilkenny*, 493 F.3d 122, 126-127 (2d Cir. 2007); *United States* v. *Wood*, 486 F.3d 781, 790 (3d Cir.), cert. denied, 128 S. Ct. 130 (2007). The Seventh Circuit reached a different result, however. See *United States* v. *Demaree*, 459 F.3d 791 (7th Cir. 2006) (holding that the Ex Post Facto Clause did not bar application of a post-offense amendment that increased the advisory Guidelines range), cert. denied, 127 S. Ct. 3055 (2007). And more recent decisions of this Court, clarifying the operation of the advisory Guidelines and rejecting several of the foundational premises of the government's analysis, have led the government to reconsider its position. See *Kimbrough* v. *United States*, 128 S. Ct. 558, 564, 570 (2007) (holding that a sentencing court may consider the disparity in the Guidelines' treatment of crack and powder cocaine offenses as a basis for varying from the Guidelines range); *Gall* v. *United States*, 128 S. Ct. 586, 594-597 (2007) (stating that district courts "may not presume that the Guidelines range is reasonable"; rejecting application of "a

heightened standard of review to sentences outside the Guidelines range"; and stating that the "rule requiring 'proportional' justifications for departures from the Guidelines range is not consistent with our remedial opinion" in *Booker*) (quoting *Booker*, 543 U.S. 220); *Irizarry* v. *United States*, 128 S. Ct. 2198, 2202 (2008) (holding that Fed. R. Crim. P. 32(h) does not require district courts to give notice before varying from the Guidelines range based on a previously unidentified factor because, "[n]ow faced with advisory Guidelines, neither the Government nor the defendant may place the same degree of reliance on the type of 'expectancy' that gave rise to a special need for notice"). In light of those decisions, the government's view is that the Ex Post Facto Clause does not apply to changes in advisory Guidelines.

b. Even if the Ex Post Facto Clause still applied, it was not violated in this case. As an initial matter, because petitioner failed to preserve her ex post facto claim in the district court, the court of appeals reviewed it only for plain error. Pet. App. 76. Petitioner therefore could prevail only if error was "obvious." *Johnson* v. *United States*, 520 U.S. 461, 467 (1997).

The courts of appeals uniformly have held that the Ex Post Facto Clause does not bar the application of a revised version of the Guidelines to a conspiracy offense that began before the revision but continued after the revision's effective date. See, *e.g.*, *United States* v. *Aviles*, 518 F.3d 1228, 1230-1231 (11th Cir. 2008); *United States* v. *Firment*, 296 F.3d 118, 120-121 (2d Cir. 2002); *United States* v. *Smith*, 46 F.3d 1223, 1239 (1st Cir.), cert. denied, 516 U.S. 864 (1995); *United States* v. *Shorter*, 54 F.3d 1248 (7th Cir.), cert. denied, 516 U.S. 896 (1995); *United States* v. *Stanberry*, 963 F.2d 1323,

1327 (10th Cir. 1992). Here, petitioner was convicted of one count of conspiracy to defraud the United States and six counts of tax evasion for tax years 1992 to 1997, and she was sentenced under the 2001 Guidelines. The district court found, and the court of appeals agreed, that petitioner committed overt acts in furtherance of the conspiracy and affirmative acts of evasion after 2001. Pet. App. 77. None of her offenses was completed before the effective date of the 2001 Guidelines, and thus there was no retroactive application of those Guidelines. *Ibid.* ("all of her offenses continued after the date on which the 2001 Guidelines became effective"). Accordingly, the court of appeals correctly held that the use of the 2001 Guidelines did not violate the Ex Post Facto Clause. *Id.* at 77-78.[3]

Petitioner argues (Pet. 18-22) that the circuits disagree whether a sentencing court violates the Ex Post Facto Clause when it applies a revised version of the Guidelines to all the offenses, some of which were completed before and some of which were completed after the revision.[4] Although petitioner appears correct that

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[3] The court of appeals noted that the district court committed a procedural error when it used the 2001 version of the Guidelines but relied on the tax table, Guidelines § 2T4.1, from the 2005 Guidelines. Pet. App. 72. Although the district court's use of two different versions of the Guidelines violated the rule requiring the use of a single version of the Guidelines manual (see note 4, *infra*), the court of appeals correctly held that any error was harmless, because "the sentencing table in both sets of Guidelines is the same with regard to [petitioner]." *Ibid.*

[4] See Guidelines §§ 1B1.11(b)(2) (sentencing court must apply the appropriate Guidelines Manual "in its entirety"), 1B1.11(b)(3) ("If the defendant is convicted of two offenses, the first committed before, and the second after, a revised edition of the Guidelines Manual became effective, the revised edition of the Guidelines Manual is to be applied to both offenses.").

some conflict exists on that question,[5] that question is not implicated here. This is *not* a case where some offenses were completed before and some after the effective date of the Guidelines used during sentencing. Rather, as discussed above, "*all* of [petitioner's] offenses"—the conspiracy count and the six counts of tax evasion—"continued after the date on which the 2001 Guidelines became effective." Pet. App. 77 (emphasis added). Therefore, the alleged circuit conflict does not bear on petitioner's sentencing.

In any event, even if any doubt remained as to the applicability of the 2001 Guidelines to the earlier tax evasion counts, there is no reason to believe that would benefit petitioner, because those Guidelines undoubtedly properly governed at least the conspiracy count (see p. 8, *supra*). Petitioner's base offense level (enhanced by two for sophisticated means) was based on the total tax loss (calculated to be $89,112), giving rise to a Guidelines range of 27-33 months. Pet. App. 28. She was sentenced concurrently on all counts to the minimum of that range. *Ibid.* That total tax loss, and thus the base offense level and minimum Guidelines range, would be the same for the conspiracy count *regardless* of which version of the Guidelines applied to the tax evasion counts. That is because the base offense level for conspiracy in cases such as this is based on the total tax loss from the conspiracy as well as the tax loss from all relevant con-

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[5] Compare *United States* v. *Ortland*, 109 F.3d 539, 545-546 (9th Cir.) (ex post facto violation), cert. denied, 522 U.S. 851 (1997); *United States* v. *Bertoli*, 40 F.3d 1384, 1403 (3d Cir. 1994) (same), cert. denied, 517 U.S. 1137 (1996), with *United States* v. *Bailey*, 123 F.3d 1381, 1404-1406 (11th Cir. 1997) (no violation); *United States* v. *Cooper*, 63 F.3d 761, 762 (8th Cir. 1995) (same), cert. denied, 517 U.S. 1158 (1996).

duct (including other related tax crimes).[6] Accordingly, petitioner cannot establish, as is her burden in plain-error review, that her total sentence would change.

2. Petitioner next argues (Pet. 27-40) that the district court abused its discretion in admitting the summary charts and that the standard governing such admissions needs clarification. The decision of the court of appeals in this case does not conflict with any decision of this Court or of another court of appeals, and the factbound question whether the district court abused its discretion in this case does not warrant this Court's review.

Federal Rule of Evidence 1006 provides that "[t]he contents of voluminous writings * * * which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation." The Federal Rules of Evidence also provide that "The [district] court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, [and]

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[6] See Guidelines §§ 2T1.1(a)(1) (2001) (tax loss amount determines base offense level), 1B1.3(a) (2001) (base offense level calculations should include all relevant conduct). In criminal tax cases, relevant conduct includes tax loss from other related tax crimes. See *id.* § 2T1.1, comment. (n.2) (2001) ("In determining the total tax loss attributable to the offense (see *id.* § 1B1.3(a)(2)), all conduct violating the tax laws should be considered as part of the same course of conduct or common scheme or plan unless the evidence demonstrates that the conduct is clearly unrelated."); see also *id.* § 1B1.3, comment. (n.9(B)) (2001) ("[A] defendant's failure to file tax returns in three consecutive years appropriately would be considered as part of the same course of conduct."). Moreover, the Guidelines contemplate that relevant conduct may include a crime for which a defendant has been convicted and has received a separate sentence. See *id.* § 5G1.3(b) & comment. (n.2) (2001).

(2) avoid needless consumption of time." Fed. R. Evid. 611(a). And petitioner acknowledges (Pet. 27) that the district court's decision "whether to allow the use of summary charts lies within the district court's discretion."

In this case, the evidence presented at trial included hundreds of commission checks and wire transfer receipts. Gov't C.A. Br. 44. That evidence was highly relevant, as the indictment alleged that those checks and wire transfers constituted the income that the defendants failed to report to the IRS and on which they attempted to evade tax. The court of appeals found that the evidence was "incredibly voluminous" and that "it would have been incomprehensible to the jury without summarization." Pet. App. 50. As the court of appeals noted, "[e]ach item listed on the summaries was supported by at least one piece of evidence, such as a check, deposit slip, bank record, or wire transfer receipt." *Ibid.* The IRS agent who presented the summaries assumed that the items listed constituted income to the Mowers, but that assumption was explained to the jury. *Ibid.* Petitioner had ample opportunity to cross-examine the IRS agent, and the district court specifically instructed the jury that the summary charts themselves were not evidence and that the jury was free to disregard the summaries. *Id.* at 51.

None of the cases cited by petitioner (Pet. 27-40) conflicts with the reasoning of the court of appeals in this case. See, *e.g.*, *United States* v. *Milkiewicz*, 470 F.3d 390, 398-399 (1st Cir. 2006) (finding no abuse of discretion when jury clearly understood assumptions underlying summary charts, defendant thoroughly cross-examined agent who compiled the summaries, and district court gave limiting instruction); *United States* v. *Means*,

695 F.2d 811, 817 (5th Cir. 1983) (upholding the admission of summary charts when assumptions underlying summary were based on the evidence and clearly explained to the jury). And the cases that petitioner cites in which courts have reversed on the basis of improperly admitted summary charts are clearly distinguishable. See, *e.g.*, *United States* v. *Citron*, 783 F.2d 307, 316-317 (2d Cir. 1986) (holding that admission of summary chart was abuse of discretion when there was no foundation laid for the figures in the summary and no explanation of the calculations underlying the summary); *Steele* v. *United States*, 222 F.2d 628, 629 (5th Cir. 1955) (reversing based on admission of summary chart when there were significant "omissions, interpretations and discrepancies between the record and these exhibits and a considerable portion of the testimony").

3. Petitioner asserts (Pet. 40-53) that four of the tax evasion counts were barred by the statute of limitations and that the circuits are divided on the question of when the statute of limitations begins to run in tax evasion cases. The court of appeals' decision is correct, and there is no such division among the circuits. The issue therefore does not warrant further review.

The statute of limitations for tax evasion is six years. 26 U.S.C. 6531. The elements of tax evasion are the existence of a substantial tax deficiency, an affirmative act constituting an evasion or attempted evasion of tax, and willfulness. 26 U.S.C. 7201; see, *e.g.*, *Sansone* v. *United States*, 380 U.S. 343, 351 (1965); *Spies* v. *United States*, 317 U.S. 492, 498-499 (1943). The general rule is that the statute of limitations for attempted tax evasion begins to run on the date the last affirmative act of evasion occurred. See, *e.g.*, *United States* v. *Anderson*, 319 F.3d 1218, 1219 (10th Cir. 2003); *United States* v. *Butler*, 297

F.3d 505, 511 (6th Cir. 2002), cert. denied 538 U.S. 1032 (2003); *United States* v. *Hunerlach*, 197 F.3d 1059, 1065 (11th Cir. 1999); *United States* v. *Wilson*, 118 F.3d 228, 236 (4th Cir. 1997); *United States* v. *DiPetto*, 936 F.2d 96, 97-98 (2d Cir. 1991); *United States* v. *DeTar*, 832 F.2d 1110, 1113 (9th Cir. 1987); *United States* v. *Ferris*, 807 F.2d 269, 271-272 (1st Cir. 1986), cert. denied, 480 U.S. 950 (1987). As the court of appeals in this case recognized, "to hold otherwise would only reward a defendant for successfully evading discovery of his tax fraud for a period of six years subsequent to the date the returns were filed." Pet. App. 45 (quoting *United States* v. *Dandy*, 998 F.2d 1344, 1355 (6th Cir. 1993), cert. denied, 510 U.S. 1163 (1994)).

This Court's decision in *United States* v. *Beacon Brass Co.*, 344 U.S. 43, 46 (1952), supports the rule that the statute of limitations does not begin to run until the last affirmative act of evasion has taken place. In that case, defendants were charged with attempting to evade tax by making false statements to Treasury representatives. They had filed a fraudulent corporate income tax return in January 1945 and then, ten months later, made a false oral statement to the IRS about the return. *Id.* at 44. On September 14, 1951, the grand jury returned an indictment charging the defendants with one count of "willfully and knowingly attempt[ing] to defeat and evade a large part of the taxes due and owing * * * by making certain false and fraudulent statements and representations, at a hearing and conference" with IRS employees on or about October 24, 1945. *Id.* at 44-45. Although this court declined to consider whether "the acts charged constitute only one crime of tax evasion which was complete when the allegedly false tax return was filed," *id.* at 46-47, this Court held that "[t]he six-year

limitation period * * * had expired on a charge for filing a false tax return in January 1945, but it had not expired on a charge of making false statements to Treasury employees in October 1945." *Id.* at 44. This Court thus has recognized that evasive acts after the filing of a return may constitute attempts to evade tax.

Here, the district court properly found, and the court of appeals agreed, that petitioner's filing of false amended corporate returns in 1998 was an affirmative act of evasion designed to conceal unreported income that petitioner had received in prior years. Petitioner does not appear to contest that factbound determination before this Court, nor would such a dispute warrant this Court's review. Because that act of evasion (relevant to all the tax-evasion counts for the pre-1996 tax years) occurred within six years of the 2002 indictment, none of those counts was barred by the statute of limitations. Pet. App. 44-47.

Petitioner argues (Pet. 48-49) that there is a division among the circuits regarding whether tax evasion is a "continuing offense." But the issue here is when the statute of limitations begins to run, not whether tax evasion is a continuing offense. See Pet. App. 47 & n.13 ("the 'continuing offense' doctrine is irrelevant here"). In any event, the Second and the Ninth Circuits—two of the circuits that petitioner claims have adopted rules that conflict with the court of appeals' holding in this case—have held that the statute of limitations begins to run after the last affirmative act of evasion. See *DiPetto*, 936 F.2d at 98 ("[W]e are in accord with several other courts which have held that a section 7201 prosecution involving the failure to file income taxes is timely if commenced within six years of the day of the last act of evasion, whether it is the failure to file a return or

some other act in furtherance of the crime."); *DeTar*, 832 F.2d at 1113 ("Even if the taxes evaded were due and payable more than six years before the return of the indictment, the indictment is timely so long as it is returned within six years of an affirmative act of evasion."). The Third Circuit cases that petitioner relies upon do not even address the statute of limitations in tax evasion cases. See *United States* v. *Pollen*, 978 F.2d 78, 86-87 (3d Cir. 1992), cert. denied, 508 U.S. 906 (1993) (holding that indictment charging multiple counts of tax evasion was not multiplicitous for double jeopardy purposes); *United States* v. *McGill*, 964 F.2d 222, 233-235 (3d Cir.) (reversing tax evasion convictions because there was insufficient evidence of affirmative acts of evasion), cert. denied, 506 U.S. 1023 (1992).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 07-1539

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In The

Supreme Court of the United States

LESLIE D. MOWER,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ of Certiorari To The United States Court of Appeals For The Tenth Circuit

REPLY BRIEF FOR PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW:

- Does the Application of the "One-Book" Rule in this case violate the *Ex Post Facto* Clause of the United States Constitution?

- Should the test district courts apply when admitting summary charts be clarified so as to achieve more uniform rulings?

- Is tax evasion a continuing offense for purposes of determining the application of the statutes of limitation?

UNITED STATES SUPREME COURT

Leslie D. Mower v. United States of America

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Leslie Mower, Appellant/Defendant ("Leslie"), in response to the United States opposition to her petition states:

ARGUMENT

1. The government contends "the *Ex Post Facto* Clause does not apply to changes in advisory Guidelines." (Resp. Brief, 8.) This sweeping assertion is not supported by the decisions of this Court, and would subject citizens to clear violations of the *Ex Post Facto* Clause.

The government argues there cannot be any violation of the *Ex Post Facto* Clause in the application of the sentencing guidelines because they are no longer mandatory. (Resp. Brief, 7). There remains, however, disagreement between the circuits on whether the *Ex Post Facto* Clause should apply to the guidelines. The government concedes the conflict between circuits,

citing decisions in both the Second and Third Circuits which have applied the rule[1], while also citing a previous decision of the Seventh Circuit which did not[2]. As is apparent, there remains confusion among the circuits as to whether or not the *Ex Post Facto* Clause applies to the sentencing guidelines. Certiorari should be granted to resolve this conflict.

The government misconstrues this Court's most recent decision in *Irizarry v. United States*, 128 S.Ct. 2198 (2008), to argue this Court has clarified the operation of the advisory Guidelines. See Resp. Brief, 8. The *Irizarry* Court held the starting point in the sentencing determination, and "[a]ny expectation subject to **due process protection** at the time [this

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[1]See Resp. Brief, p. 7 (citing *United States v. Kilkenny*, 493 F.3d 122, 126-127 (2d Cir. 2007); *United States v. Wood*, 486 F.3d 781, 790 (3d Cir.), cert. denied, 128 S. Ct. 130 (2007)).

[2]See Resp. Brief, p. 7 (citing *United States v. Demaree*, 459 F.3d 791 (7th Cir. 2006) cert. denied, 127 S. Ct. 3055 (2007)).

Court] decided *Burns* that a criminal defendant would receive a sentence within the presumptively applicable guideline range did not survive [the] decision in *United States v. Booker*, 543 U.S. 220." *Id.* at 2202 (emphasis added).

This Court's decision in *Irizarry* did not limit the constitutional protections of the *Ex Post Facto* Clause. *Id.* It merely limits the broad requirements of Rule 32(h) of the Federal Rules of Criminal Procedure and provides that notice to a criminal defendant of an upward variance in the Guidelines range is not required, and will not offend the Due Process Clause. *Id.* While the subject matter of the *Irizarry* decision is not on point, the dissenting opinion, provides this further insight:

> Courts, while now free to impose sentences that vary from a Guideline-specified range, have *always* been free to depart from such a range. See USSG ch. 1, pt. A, § 4(b) (Nov. 1987),

> reprinted in § 1A1.1 comment., editorial note (Nov. 2007) (suggesting broad departure authority). Indeed, even *Burns* recognized that "the Guidelines place essentially no limit on the number of potential factors that may warrant a departure." 501 U. S., 136-137 (citing USSG ch. 1, pt. A, §4(b) (1990)). Regardless, if *Booker* expanded the number of grounds on which a district court may impose a non-Guideline sentence, that would seem to be an additional argument *in favor of*, not *against*, giving the parties notice of the district court's intention to impose a non-Guideline sentence for some previously unidentified reason. Notice, after all, would promote "focused, adversarial" litigation at sentencing. *Burns*, *supra*, at 134, 137.

Id. at 2206, J. Breyer joined with J. Kennedy, J. Souter, and J. Ginsberg, dissenting.

The application of the *Ex Post Facto* Clause to the use of sentencing guidelines is equally relevant to the application of due process. The concern remains that application of the guidelines, whether mandatory or not, affects the sentencing possibilities of a citizen. If they are to change there remains an *Ex Post Facto* right requiring protection.

Leslie's argument remains valid: whether the One-Book rule adopted in *Booker*, and as applied in this case, violates the *Ex Post Facto* Clause. This issue is ripe for review.

The government mistakenly contends the issue does not bear on petitioner's sentencing. In this matter, the Tenth Circuit Court of Appeals affirmed the District Court's approach of combining separate tax evasion offenses and sentencing Leslie, pursuant to revised Guidelines in effect on the date of the last alleged offense. *See United States v. Thompson*, 518 F.3d 832 (10th Cir. 2008). Leslie was convicted of conspiracy and tax evasion for years 1992-1997. *Id.* There were *three* different versions of the Sentencing Guidelines available for the District Court to use: 1993, 2001, and 2005. The District Court computed the tax loss using the 2005 Sentencing Guidelines but

determined her sentence using the 2001 Sentencing Guidelines. *Id.*, see also Doc. 259. Although acts of conspiracy were found to have occurred after 2001, the conspiracy count did not apply to all six counts of tax evasion. Therefore, all six counts of tax evasion should not have been computed under the 2001 or 2005 revised Guidelines. The District Court applied policy statement §1B1.11(b)(3) in a mandatory fashion, using the revised guidelines and violating the *Ex Post Facto* Clause. Leslie's sentence was affected by the District Court's sentencing. That was inconsistent and unfair to Leslie.

The circuits remain divided on the question of whether sentences consistent with Section 1B1.11(b)(3) and the One-Book rule violate the *Ex Post Facto* Clause. Both the Ninth Circuit and the Third Circuit remain of the view that it does. *See United States v.*

Bertoli, 40 F.3d 1384, 1405 (3d Cir. 1994) (holding that the One-Book rule does not override *Ex Post Facto* concerns, stating "[t]he so-called rule is inconsistent.and other cases in this Court...have prohibited the application of more stringent penalties than were authorized at the time of the offense."); *see also United States v. Ortland*, 109 F.3d 539, 546 (9th Cir. 1997) (holding that "[e]ven if the later offense is sentenced at a higher level, that does not undercut the fact that the earlier offenses cannot be," and expressly stating the policy statement of §1B1.11(b)(3) violated the *Ex Post Facto* Clause of the constitution).

Contrarily, the Eleventh Circuit determined the application of §1B1.11(b)(3) did not violate the *Ex Post Facto* Clause even though it resulted in a harsher sentence for an offense committed prior to enactment of the Sentencing Guidelines in effect at the time of the

sentencing in *United States v. Bailey*, 123 F.3d 1381 (11th Cir. 1997). Further, in *United States v. Cooper*, 35 F.3d 1248, 1250-53 (8th Cir. 1994), a defendant committed three separate firearm offenses, two committed prior to the effective date of an updated version of the Sentencing Guidelines, and the court affirmed application of the revised Sentencing Guidelines even though it resulted in an increased penalty.

The Circuit decisions regarding this issue are irreconcilable. Both the Third and Ninth Circuits have held that separate offenses, whether or not the same crime, should be analyzed and the defendant sentenced under the corresponding Guidelines in effect when each separate offense occurred. See *Bertoli*, 40 F.3d at 1405); see also *Ortland*, 109 F.3d 539. These Circuits found that applying the policy of §1B1.11(b)(3) violated

the *Ex Post Facto* Clause of the Constitution. *Id.* However, the First, Second, Eighth, Tenth, and Eleventh Circuits have held that separate offenses should be sentenced under the version of the Guidelines in effect at the time of the last act. See *Bailey*, 123 F.3d at 1403-07; *Cooper*, 35 F.3d at 1250-53; *Thompson*, 518 F.3d at 869-70. These Circuits found no violation of the *Ex Post Facto* Clause because the Guidelines' policy statement §1B1.11(b)(3) states that no such violation occurs.

The law is in conflict on this issue. The approach taken by the First, Second, Eighth, Tenth, and Eleventh Circuits violates the plain language of the *Ex Post Facto* Clause. It deprives U.S. citizens of due process of law by failing to provide notice of more severe penalties after the Sentencing Guidelines are revised. This Court's decision in *Irizarry* does not

nullify this conflict.

Citizens are denied consistent treatment of sentencing dependent upon which Circuit Court reviews their case. The same acts in the Ninth Circuit will result in a defendant receiving fair sentencing under the Sentencing Guidelines in effect when his crime was committed, whereas the same defendant in the Tenth Circuit will receive harsher sentencing under the Sentencing Guidelines in effect on the date he committed his last crime. This is the kind of disparate result which violates equal protection standards of the Constitution.

This Court must clarify the appropriate test for the application and use of the Sentencing Guidelines in order to ensure equal treatment in each Circuit, while also protecting constitutional freedoms.

2. The government wrongly contends no review of the admission of summary charts is warranted because the District Court delivered a limiting instruction and Leslie had an opportunity to cross-examine the IRS agent. In this case the Government prepared and presented summary charts that grossly distorted the evidence and the District Court failed to provide adequate safeguards to prevent prejudice. The lack of clarity in admitting summary charts and the standards governing admission warrant this Court's review.

Rule 1006 of the Federal Rules of Evidence requires that "a summary document 'must be accurate and nonprejudicial.'" *United States v. Bray*, 139 F.3d 1104, 1110 (6th Cir. 1998). Although the decision whether to allow the use of summary charts lies within the district court's discretion, *see United States v. Diez*, 515 F.2d 892, 906 (5th Cir. 1975), courts recognize the

danger of using summary charts because the jury may use the charts exclusively in arriving at a verdict, rather than examining the primary evidence the charts purport to summarize. *Holland v. United States*, 348 U.S. 121, 127-8 (1954), *reh. denied*, 348 U.S. 932 (1955). There is danger of substantial prejudice because figures on charts give an aura of authenticity to the government's allegations: "bare figures have a way of acquiring an existence of their own, independent of the evidence which gave rise to them." *Id.* at 128.

In this case, the jury relied on exaggerations contained in charts to convict Leslie. The District Court later found the charts the jury relied upon to be overstated and erroneous. However, the jury was never instructed about this embellishment; indeed their decision had already been made.

First, the Government's exhibits attributed personal income to Leslie of $3,775,764 and unreported income of $3,209,815. (Ex. 80-3). Specifically, the charts stated that foreign corporate commission was personal income to Leslie instead of properly categorizing it as corporate income. *Id.* Considering the evidence in favor of the Government, the District Court found Leslie had unreported income of less than 10% of that amount: $318,256. (Doc. 59, ¶16). Yet, the District Court allowed the summary charts to remain before the jury and allowed the jury to rely upon the charts throughout the two week trial. This is just the sort of improper and prejudicial information that prior courts have warned should not be admitted. *See United States v. Means*, 695 F.2d 811, 817 (5th Cir. 1983). It was admitted because of an abuse of discretion allowed by an uncertain rule.

The inaccurate summary charts remained visible to the jury during the entire two-week trial. They were brought into the jury room during deliberation. Although the District Court found that the $2,709,403 in foreign commission was not personal income to Leslie, it could not reduce or eliminate the prejudice of these overstated figures from the summary charts in one limiting instruction. (Doc. 259, ¶¶ 15-16). This was an abuse of discretion. *See, e.g., United States v. Citron*, 783 F.2d 307, 316-317 (2d Cir. 1986) (holding that the admission of summary chart exhibits was an abuse of discretion when there was no foundation laid for the figures in the summary.); *Steele v. United States*, 222 F.2d 628, 629 (5th Cir. 1955) (reversing admission of summary chart exhibits when there were significant "omissions, interpretations and discrepancies between the record and these exhibits

and a considerable portion of the testimony.")

In some Circuits, the district court's discretion to allow use of summary charts has been upheld merely because of a limiting instruction given to the jury. *See United States v. Harms*, 442 F.3d 367, 376 (5th Cir. 2006); *United States v. Daniels*, 986 F.2d 451, 456 (11th Cir. 1993); *United States v. Casamento*, 887 F.2d 1141, 1151 (2nd Cir. 1989); *United States v. Mann*, 884 F.2d 532, 539 (10th Cir. 1989). As in Leslie's case, this instruction is insufficient to erase the "aura of authenticity" surrounding summary chart exhibits.

Other Circuits have followed a separate standard. The First Circuit in *Milkiewicz* adopted a standard that if applied in this case likely would have resulted in a different finding. *See United States v. Milkiewicz*, 470 F.3d 390, 398 (1st Cir. 2006). The *Milkiewicz* Court upheld the use of summary chart

exhibits because "the district court exercised discretion with meticulous care," including requiring the government to modify the summaries to eliminate unnecessary and potentially prejudicial information and labels, and explicitly considering "the usefulness versus the potential misuse of summaries of this nature." *Id.*

Specifically, the First Circuit approved of steps taken by the trial court in that case for the admission of summary charts under Federal Rule of Evidence 1006. *Id.* Under this standard, the district courts would be required to (1) modify the chart summaries to eliminate unnecessary and potentially prejudicial information and labels, (2) weigh the usefulness of the chart with the potential misuse of the summaries, and (3) provide a limiting instruction to the jury regarding the use of summary charts. *Id.* While that should

have happened here, it did not. The rule does not yet require it.

The Circuits are in desperate need of clarification of the standard for admission of summary chart exhibits. The government recognizes instances where summary chart exhibits are inadmissible due to the prejudice from the charts themselves (Resp. Opposition, 13). This case is such an instance. The Circuits are divided on whether a limiting instruction is sufficient, or whether greater protections are necessary to eliminate any prejudice resulting from such exhibits. Adoption of a uniform rule, as was applied by the First Circuit, would provide uniformity and direction to the district courts in admitting summary charts, while also guarding against inconsistent and prejudicial results to the parties.

3. The government incorrectly asserts the issue in this case is not whether tax evasion is a continuing offense, but when the statute of limitations begins to run for tax evasion. (Resp. Opposition, 15). Whether the continuing offense doctrine applies to multiple years of tax evasion is the first step in determining the appropriate statute of limitations. This Court must clarify whether tax evasion is a continuing offense. The law is unclear, irreconcilable, and inconsistent in its application. Therefore, the issue warrants this Court's review.

Courts considering Congress' intent have found attempted tax evasion not to be a continuing offense. See eg., *United States v. McGill*, 964 F.2d 222, 230 (3rd Cir. 1992); *Norwitt v. United States*, 195 F.2d 127, 133 (9th Cir. 1952) ("An attempt to evade a tax and payment thereof is not a continuing offense"); *United*

States v. Sullivan, 98 F.2d 79, 80 (2nd Cir. 1938)(holding an attempt to evade income tax is a separate offense for each year); *United States v. Kirkman*, 755 F. Supp. 304, 306-08 (D. Idaho, 1991) (concluding tax evasion is not a continuing offense); *see also United States v. Johnson*, 123 F.2d 111, 119 (7th Cir. 1941), reversed on other grounds in *United States v. Johnson*, 319 U.S. 503, 63 S.Ct. 1233, 87 L.Ed. 1546. The Third Circuit found the plain language of Section 7201 "evidences the congressional intent to allow distinct, significant, affirmative acts of tax evasion to constitute separate section 7201 offenses." *United States v. Pollen*, 978 F.2d 78, 86 (3rd Cir. 1992); *see also United States v. Gray*, 876 F.2d 1411, 1418 (9th Cir. 1989) (holding that the doctrine of continuing offenses should not apply "unless the explicit language of the substantive criminal statute compels such

conclusions, or the nature of the crime involved is such that Congress must assuredly have intended that it be treated as one.")

In this case the District Court concluded the statute of limitations began to run on Counts Two through Five, which relate to the tax years 1992 through 1995, upon the filing of amended corporate tax returns for Neways, Inc. filed in September and October 1998. (Doc. 221 Memorandum Decision 8/19/05, 7). Relying upon the amended corporate returns was an error. As discussed above, an attempt to evade income tax is a separate offense for each year. *Sullivan*, 98 F.2d at 80; *Kirkman*, 755 F. Supp. at 306-08; *Pollen*, 978 F.2d at 86. The District Court lumped the tax years together, in clear violation of *Sullivan*, 242 F.3d at 1254 and *Pollen*, 978 F.2d at 86. Further, the Tenth Circuit ignored its own precedent,

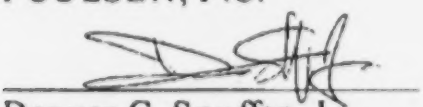
by upholding Leslie's conviction using an incorrect standard of the statute of limitations in tax evasion cases. Under *United States v. Anderson*, 319 F.3d 1218 (10th Cir. 2003), the statute of limitations begins to run on the date of the last affirmative act of evasion *for each count*, not the last count alleged in the indictment. This Court must clarify these inconsistencies.

CONCLUSION

Based on the foregoing, Petitioner respectfully requests this Court accept her Petition and grant Certiorari to review the issues affecting her.

Dated this 1st day of October, 2008.

NELSON, SNUFFER, DAHLE & POULSEN, P.C.



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No. 07-1539

In The

Supreme Court of the United States

LESLIE D. MOWER,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ of Certiorari To The United States Court of Appeals For The Tenth Circuit

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CERTIFICATE OF SERVICE

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